No. 5692

16

United States

Circuit Court of Appeals

For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

EMIL JOHNSON,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Sacramento, Calif.

In the Superior Court of the State of California, in and for the County of Sacramento.

EMIL JOHNSON,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Defendant.

ORDER FOR REMOVAL.

On reading and filing the petition and bond of defendant, Sacramento Suburban Fruit Lands Company, a corporation, for removal of the above-entitled cause to the Northern Division of the United States District Court, in and for the Northern District of California, Second Division, and it

appearing to the Court that written notice of said petition and bond for removal was duly given by said defendant to plaintiff prior to filing said petition and bond, and this matter coming on for hearing, said bond is hereby approved and accepted as good and sufficient.

AND IT IS HEREBY ORDERED that said cause be and the same is hereby removed to the Northern Division of the United States District Court, in and for the Northern District of California, Second Division.

Dated: Sacramento, California, August 20, 1927.

J. R. HUGHES,
Judge of the Superior Court.

[Endorsed]: "Order for Removal." Filed Aug. 20, 1927. [1*]

In the Superior Court of the State of California, in and for the County of Sacramento.

EMIL JOHNSON,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Defendant,

COMPLAINT.

Plaintiff complaining alleges:

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*Page-number appearing at the foot of page of original certified Transcript of Record.

I.

That defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That on and prior to the 27th day of February, 1923, plaintiff was the owner of that certain real property in the County of Hennepin, State of Minnesota, and plaintiff's interest in said real property was worth in excess of Six Hundred ($600.00) Dollars.

III.

That prior to said 27th day of February, 1923, defendant for the purpose of cheating and defrauding plaintiff out of said property and out of said moneys belonging to plaintiff by inducing him to enter into the contract hereinafter referred to falsely and fraudulently stated and represented to plaintiff that all of the real property which defendant was then offering for sale, including Lot 35 of Rio Linda Subdivision 5 as per the official map filed in the office of the County Recorder of the County of Sacramento, State of California, and located in said County of Sacramento, was rich and fertile, was capable of producing all sort of farm products and crops, that said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that said land was perfectly adapted to the raising of all kinds of fruits; that fruit-trees of all kinds would thrive and flourish thereon and produce an

[2] abundance of fruit of the finest quality. That defendant further stated that the said Lot 35 contained ten acres of land and that said land was of the fair and reasonable market value of Four Thousand ($4,000.00) Dollars.

IV.

That plaintiff had never visited said land and was wholly unfamiliar with the values, characteristics and/or qualities of California lands and was entirely unfamiliar with the growing of fruits and the sort of land adapted to the growing of fruits. That defendant knew that plaintiff was ignorant of the matters necessary to make a proper or wise purchase of California lands or any fruit lands and was ignorant of the value thereof and that plaintiff was relying upon said representations and each of them but nevertheless made said representations and each of them for the purpose of cheating and defrauding plaintiff by inducing him to enter into the contract hereinafter referred to.

V.

That it was not then, there or at all true that said land was of any value in excess of One Hundred and Fifty ($150.00) Dollars and/or that any of said land was fertile and/or would produce any crops in commercial quantities and/or was at all adapted to the growing of fruits or fruit-trees.

VI.

That plaintiff relied upon the representations of defendant and each of them and solely because of his reliance thereon entered into an agreement with

defendant on or about the 27th day of February, 1923, whereby plaintiff agreed to purchase from defendant said Lot 35 of Rio Linda Subdivision 5 at a price of Four Thousand ($4,000.00) Dollars, paid thereon One Thousand ($1,000.00) Dollars by conveying the said real property in Hennepin County, Minnesota, and giving a promissory note for Four Hundred ($400.00) Dollars and agreed to pay the balance in installments of Six Hundred ($600.00) Dollars per year, payable upon the 22nd day of February of each year thereafter. That thereafter defendant agreed to and did waive the strict performance of the covenant to pay Six Hundred ($600.00) Dollars per [3] year and agreed to keep said contract in force if plaintiff would pay Forty ($40.00) Dollars per month thereon. That plaintiff has well and faithfully kept and performed all the other terms, covenants and conditions of said contract on his part to be performed and has kept up said payments of Forty ($40.00) Dollars per month and is ready, willing and able to perform all of the covenants of said contract as modified.

VII.

That plaintiff did not discover the falsity of said representations until the spring of 1927 and prior thereto had expended large sums of money in the improvement of said real property. That plaintiff built chicken-coops thereon at an expense of One Thousand and Fifty ($1,050.00) Dollars; installed a pump plant, tank-house and water system at an

expense of Seven Hundred and Twenty-two ($722.00) Dollars, distributed as follows:

Well	$52.00
Pump Pit	45.00
Pipes	75.00
Pump	300.00
Tank-house	350.00

That during said period, plaintiff planted approximately One Thousand Three Hundred (1,300) grape-vines, about 300 thereof in the year 1926 and 1,000 thereof in the year 1927, and the cost of purchasing and planting said vines was in excess of One Hundred and Fifty ($150.00) Dollars. That plaintiff also planted approximately 65 fruit-trees thereon and cultivated the same and attempted to make them grow and in so doing expended in money and labor approximately Two Hundred ($200.00) Dollars. That plaintiff reconstructed a certain garage upon said lands into a dwelling-house, and the reasonable and actual cost of so doing was approximately One Thousand Two Hundred ($1,200.-00) Dollars. That had said lands been as represented, the bare land would have been worth Four Thousand ($4,000.00) Dollars and upwards and with the improvements placed thereon by plaintiff said property would have been worth [4] not less than Ten Thousand ($10,000.00) Dollars. That said grape-vines has died and said trees are dying and because of the unfertility of said soil said land is not worth in excess of One Hundred and Fifty ($150.00) Dollars, and the said improvements thereon are not worth in excess of Eight Hundred

and Fifty ($850.00) Dollars. That, by reason of the premises, plaintiff has been damaged in the sum of Nine Thousand ($9,000.00) Dollars.

WHEREFORE, plaintiff prays judgment for Nine Thousand ($9,000.00) Dollars, costs of suit and general relief.

RALPH H. LEWIS.
GEORGE E. McCUTCHEON. [5]

State of California,
County of Sacramento,—ss.

Emil Johnson, being first duly sworn, deposes and says, that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

EMIL JOHNSON.

Subscribed and sworn to before me this 9th day of August, 1927.

[Seal] GEORGE E. McCUTCHEON,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: "Complaint." Filed Aug. 11, 1927. [6]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes defendant, and demurring to the complaint of the plaintiff on file herein, for grounds of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays hence to be dismissed, with its costs of suit herein incurred, and that plaintiff take nothing by his said action.

BUTLER, VAN DYKE & DESMOND.

[Endorsed]: "Demurrer to Complaint." Filed Aug. 20, 1927.

Service hereof is hereby admitted and receipt of copy acknowledged this 19th day of August, 1927.

GEORGE E. McCUTCHEN and
RALPH H. LEWIS,
Attorneys for Plaintiff. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 12th day of September, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 12, 1927 —ORDER OVERRULING DEMURRER.

Demurrer to complaint came on to be heard in the above-entitled case. By consent, IT IS ORDERED that said demurrer be and the same is hereby overruled, with leave to answer within 30 days. [8]

[Title of Court and Cause.]

ANSWER.

Now comes the defendant, and answering the complaint of plaintiff on file herein, admits, denies and alleges as follows, to wit:

I.

Admits the allegations of Paragraph I of plaintiff's complaint.

II.

Admits that on and prior to the 27th day of February, 1923, plaintiff was the owner of certain real property in the County of Hennepin, State of Minnesota.

III.

Admits that plaintiff had never visited the land described in Paragraph III of plaintiff's complaint prior to making the contract with defendant on or about the 27th day of February, 1923. Concerning the allegations in Paragraph IV of plaintiff's complaint to the effect that prior to the making of

said contract plaintiff was wholly unfamiliar with values, characteristics and/or qualities of California lands, and was entirely unfamiliar with the growing of fruits and the sort of land adapted to the growing of fruits, defendant alleges that it has [9] not sufficient information or belief upon or concerning said allegations to enable it to answer the same, and for that reason and upon that ground denies, both generally and specifically, each and all of said allegations.

IV.

Admits that on or about the 27th day of February, 1923, plaintiff entered into a contract with defendant whereby plaintiff agreed to purchase from defendant Lot 35 of Rio Linda Subdivision No. 5 at a price of $4,000.00, and paid thereon the sum of $1,000.00, by conveying real property in Hennepin County, Minnesota, but in this connection defendant alleges that although plaintiff received a credit upon the purchase price of said lands of $1,000.00 in consideration of the conveyance to defendant of said property in Hennepin County, that the actual value of said property did not exceed the sum of $———. Admits that plaintiff gave to defendant a promissory note for $400.00, and agreed to pay the balance of the purchase price of said land in installments of $600.00 per year, payable on the 22d day of February each year thereafter. Admits that defendant agreed to and did waive the strict performance of the covenant to pay $600.00 per year, and agreed to keep said contract

in force if plaintiff would pay $40.00 per month thereon.

V.

Admits that plaintiff built upon said property chicken-coops and installed a pump plant, tank-house and water system. Concerning the allegations in Paragraph VII of plaintiff's complaint that plaintiff expended $1,050.00 in the building of chicken-coops; $722.00 in the installation of a pump plant, tank-house and water system, and that during said period plaintiff planted approximately 1,300 grape-vines, about 300 thereof in the year 1926, and 1,000 thereof in the year 1927, and that the cost of purchasing and planting said vines was in excess of $150.00, [10] defendant alleges that it has not sufficient information or belief upon or concerning the said allegations to enable it to answer the same, and, therefore, for that reason and upon that ground it denies each and all of said allegations. Admits that plaintiff also planted approximately 65 fruit-trees on said property, and reconstructed a garage into a dwelling-house. Concerning the allegations in Paragraph VII of plaintiff's complaint to the effect that plaintiff expended in money and labor approximately $200.00 in planting fruit-trees and cultivating the same, and the sum of $1,200.00 in reconstructing the said garage into a dwelling-house, defendant alleges that it has not sufficient information or belief upon or concerning the said allegations to enable it to answer the same, and for that reason and upon that ground it denies, both

generally and specifically, each and all of said allegations.

VI.

Defendant denies each and all of the allegations of plaintiff's complaint not hereinabove denied for want of information or belief, or not hereinabove expressly admitted.

As a further defense to plaintiff's action herein, defendant alleges:

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof of the Code of Civil Procedure of the State of California.

WHEREFORE, defendant prays that plaintiff take nothing by his said action herein, and that defendant have and recover of and from plaintiffs its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant. [11]

State of California,
County of Sacramento,—ss.

L. B. Schei, being duly sworn, deposes and says: That he is an officer, to wit, the resident secretary of Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the within entitled action; that he makes this affidavit for and on behalf of said corporation defendant; that he has read the foregoing and annexed answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters

as are therein stated upon information or belief, and as to such matters he believes it to be true.

L. B. SCHEI,
Resident Secretary.

Subscribed and sworn to before me this 13th day of October, 1927.

[Seal] A. E. WEST,
Notary Public in and for the County of Sacramento, State of California.

Service hereof is hereby admitted and receipt of copy acknowledged this 13 day of October, 1927.

RALPH H. LEWIS,
GEO. E. McCUTCHEON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 13, 1927. [12]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Friday, the 14th day of September, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge, for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 14, 1928 —TRIAL.

This case came on regularly this day for trial. Geo. E. McCutchen, Esq., Ralph Lewis, Esq., and Otis D. Babcock, Esq., appearing as attorneys for the plaintiff and Arthur C. Huston and J. W. S. Butler, Esq., appearing as attorneys for the defendant. Thereupon the following named persons, viz.:

A. J. Nevis,	C. E. Anabel,
John Hoesch,	G. R. Stephen,
Ray C. Flory,	Leo Laskie,
L. C. Pillsbury,	Alexander Furness,
J. W. Neeley,	J. R. Lottermose, and
A. L. Young,	Charles Phillips,

twelve good and lawful jurors, were after being duly examined under oath sworn to try the issues joined herein. Counsel for both sides made their opening statements to the Court and jury. Emil Johnson, Bettie Johnson, Charles T. Tipper, R. B. Loucks, Howard D. Kerr, Julius Hogan and Herbert C. David were duly sworn and testified in behalf of the plaintiff, and plaintiff introduced in evidence and filed his exhibits marked Nos. 1, 2, 3, 4, 6 and 7, and the plaintiff rested. F. E. Unsworth, John Posehn, H. F. Bremer, H. M. Edmunds, J. S. McNaughton, Lambert Hagel, E. P. Verner, R. O. Bolden, Louie [13] Louie Turkelson, F. E. Twinning, E. H. Traxler, Arthur Mor-

ley, O. W. Jarvis, L. B. Schei, E. E. Amblad and M. A. Crinkley were sworn and testified on behalf of the defendant, and the defendant introduced in evidence and filed his exhibits marked Nos. 5, 5½, 8, 9, 10, 11 and 12, and the defendant rested. Carrie Klaffenbach and Jacob M. Johnson were called in rebuttal and testified on behalf of the plaintiff and Emil Johnson was recalled in rebuttal and testified on behalf of the plaintiff. Counsel for both sides made their arguments to the Court and jury at the conclusion of which IT WAS ORDERED that the further trial hereof be continued to Saturday, September 15th, 1928, at 9:30 A. M. [14]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Saturday, the 15th day of September, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge, for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 15, 1928 —TRIAL (RESUMED).

The parties hereto and the jury impaneled herein being present as heretofore the trial was thereupon

resumed. After the instructions of the Court to the jury, the jury at 10:20 o'clock A. M. retired to deliberate upon their verdict. At 11:00 o'clock A. M. the jury returned into court and upon being asked if they had agreed upon their verdict, replied in the affirmative, and returned the following verdict which was ORDERED recorded, viz.:

> "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Eighteen Hundred and Fifty Dollars ($1850.00) Dollars.
>
> CHAS. A. PHILLIPS,
> Foreman."

and the jury being asked if said verdict as recorded is their verdict, each juror replied that it is. ORDERED that judgment be entered in accordance with said verdict, the amount of said verdict to apply on the amount of money the plaintiff now owes the defendant, said amount to be hereinafter fixed by the Court. FURTHER ORDERED that the jurors especially called in to try this case be excused from further attendance upon this Court. ORDERED that Juror L. C. Pillsbury be excused until Monday, September 17th, 1928. [15]

[Title of Court and Cause.]

VERDICT.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the

sum of Eighteen Hundred and Fifty *Dollars* ($1850.00) Dollars.

CHAS. A. PHILLIPS,
Foreman.

[Endorsed]: Filed Sept. 15, 1928, at 10 A. M. [16]

In the Northern Division of the United States District Court for the Northern District of California.

No. 425—LAW.

EMIL JOHNSON,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 14th day of September, 1928, being a day in the April, 1928, Term of said Northern Division of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, Geo. E. McCutchen, Esq., Ralph Lewis, Esq., and Otis D. Babcock, Esq., appearing as attorneys for the plaintiff, and Arthur C. Huston, Esq., and J. W. S. Butler, Esq., appearing as attorneys for the defendant; and the trial having been proceeded with on the 14th and 15th days of Sept., 1928, in said Term, and evidence, oral and

documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury, the jury having subsequently rendered the following verdict, which was ORDERED recorded, to wit:

> "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Eighteen Hundred and Fifty *Dollars* ($1850.00) Dollars.
>
> CHAS. A. PHILLIPS,
> Foreman,

and the Court having ORDERED that judgment be entered in accordance with said verdict:

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,— [17]

IT IS ORDERED AND ADJUDGED that the plaintiff Emil Johnson do have and recover of and from the defendant Sacramento Suburban Fruit Lands Company, a corporation, the sum of Eighteen Hundred and Fifty ($1850.00) Dollars, and for costs taxed at $30.85. FURTHER ORDERED that the amount of verdict apply on amount of money the plaintiff owes defendant, the amount to be hereinafter fixed by the Court.

Judgment entered this 15th day of September, 1928.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [18]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, for the Northern District of California:

Now comes the defendant, Sacramento Suburban Fruit Lands Company, a corporation, by its attorneys, and respectfully shows:

That the defendant, feeling aggrieved by the verdict and judgment thereon in said cause rendered on the 15th day of September, 1928, in favor of plaintiff and against defendant, for the sum of One Thousand Eight Hundred Fifty ($1,850.00) Dollars, damages, with costs amounting to Thirty and 85/100 ($30.85) Dollars, hereby petitions the Court for an order allowing the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and that a citation be issued as provided by law, and that a transcript of the record upon which said judgment was based be sent to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings in this court be suspended and stayed until the determination of the appeal, and that an order be made fixing the amount of surety which said defendant shall give upon this appeal.

Dated: October 24th, 1928.

ARTHUR C. HUSTON,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant. [19]

Service hereof is hereby admitted and receipt of copy acknowledged this 24th day of October, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
OTIS D. BABCOCK,
Attorneys for Pltf.

[Endorsed]: Filed Oct. 24, 1928. [20]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the above-entitled cause, and makes and files the following assignment of errors, upon which it will rely in its prosecution of the appeal from the verdict and the judgment thereon, herein made and entered on the 15th day of September, 1928, in favor of the plaintiff and against this defendant:

I.

The Court erred in sustaining an objection to questions asked the witness, H. M. Edmunds, as follows:

"Q. Are you acquainted with the location in which the property of Emil Johnson is situated? A. Yes, sir.

Q. You know that general district?

A. Yes, sir.

Q. Do you know the Johnson property, in particular? A. No, sir, I do not.

Q. But the general district and location, you are familiar with some of the properties out there? [21] A. Yes, sir.

Q. And have been familiar with it since February 27th, 1923? Have you been familiar with that district in which that Johnson property is located since that time? A. Yes, sir.

Q. Do you know the value of land out there for the purposes for which they are adapted, reasonable market value? A. Yes, sir.

Q. What in your opinion would be the value of land in the district in which the Emil Johnson property is located in the month of February, 1923?

Mr. McCUTCHEN.—Objected to as incompetent, irrelevant and immaterial, and the proper foundation not laid.

The COURT.—I hardly think the competency of the witness has been shown. Objection sustained.

Mr. BUTLER.—Exception. That is all."

II.

The Court erred in sustaining an objection to questions asked Lambert Hagel, as follows:

"Q. Do you know the location of the Emil Johnson place?

A. I have been going by many times, and I don't know—

Q. You know where it is?

A. I know where it is.

Q. You know the district where it lies generally? A. Yes, sir. [22]

Q. How far from your place?

A. About a mile and a half.

Q. Do you know any reason why you cannot raise fruit and vegetables and grape-vines on that soil the same as you have on yours with proper attention?

Mr. McCUTCHEN.—Objected to. I don't think the question—he says, "Do you know any reason" why he couldn't.

The COURT.—Sustained. He says he doesn't know anything about it.

Mr. BUTLER.—Exception. That is all."

III.

The Court erred in sustaining an objection to a question asked E. M. traxler as follows:

"Q. Comparing again the lands in the Arcade Park District, what were those lands sold for?

Mr. McCUTCHEN.—Objected to as incompetent, irrelevant and immaterial.

Mr. BUTLER.—Withdrawn. What was the reasonable value of that land on an acreage basis, in the Arcade Park section?

Mr. McCUTCHEN.—Same objection. He is cross-examining his own expert.

Mr. BUTLER.—I think I have the right—that is withdrawn.

Q. Do you have in the Arcade Park District any advantages which they have in Rio Linda?

Mr. McCUTCHEN.—The same objection. [23]

The COURT.—Sustained.

Mr. HUSTON.—Exception."

(The witness had previously testified: "Q. During the time that you were with the Ben Leonard Company they were the owner of a tract of land in the immediate vicinity of Rio Linda, were they not? A. Yes, sir, south.

Q. Next adjoining the colony to the south?

A. South of Rio Linda.

Q. And you were familiar with that tract of land that is known as the Arcade Park District?

A. Yes, sir.

Q. Now, let me ask you if you were familiar with sales of lots in the Arcade Park District?

A. Yes, sir, sold a good many.

Q. How do the conditions there as to depth and quality of soil compare with the depth and quality of soil throughout the Rio Linda District?

A. About the same depth.")

IV.

The Court erred in striking out part of the testimony of M. A. Crinkley as follows:

"Q. You say that this land cost $85 and $100 an acre. As a matter of fact, wasn't that

bought years before you became connected wtih the company?

A. I already testified it was bought in 1911 and I became identified with the company in 1915. [24]

Q. You didn't have anything to do with the sale? You weren't there when they made the transaction?

A. I wasn't there when they purchased the land.

Q. All you know about it is what somebody tells you? A. Let me finish my answer.

Q. Of your own knowledge.

A. Yes, I know all about it.

Q. How do you know?

A. Mr. McCutchen, I came out in the year 1916 and paid to the Sacramento Valley Development Company several hundred thousand dollars in cash, and if a man doing that doesn't know about the transaction, I don't know—

Q. You don't know of your own knowledge what had been paid him?

A. If I don't, how would I know how much to pay him in 1916?

The COURT.—Don't argue.

The WITNESS.—Now, your Honor, it is not fair—

The COURT.—He is asking you if what you knew, you knew by hearsay.

A. No, sir, it is hardly hearsay.

The COURT.—No argument.

Mr. McCUTCHEN.—I move to strike his testimony as to what was paid for the land.

The COURT.—It will be stricken.

Mr. HUSTON.—Exception.

V.

The Court erred in instructing the jury on the question of representations alleged to have been made by defendant. [25]

VI.

The Court erred in instructing the jury that the alleged representations induced plaintiff to buy.

VII.

The Court erred in refusing to give defendant's proposed instruction on the question of intent, reading as follows:

> "The essence of a cause of action for deceit consists in the fact that the false representations were made with intent to deceive, such intent being a necessary element to constitute actual fraud. It must appear from a preponderance of the evidence that the false representations, if any, were made by defendant with a fraudulent intent, and for the purpose of inducing the plaintiff to act upon them."

VIII.

The Court erred in instructing the jury as follows:

> "So if you find that these representations of value and adaptation to commercial orchards were an inducement to plaintiff, and influenced him to buy, then you proceed to the next step,

which is: Did the defendant know of the falsity of the representations, if they were false, which we will come to later? In these books they represented that it was already proven that the land was adapted to the commercial raising of fruit. There they state it as a fact. If it was not, it ought to be inferred that they knew, because they had every opportunity to know. The land was there. Moreover, if they didn't know it was false, all under [26] the circumstances, considering their relation to the land and their opportunities and their general knowledge, if they ought to have known, it is the same thing as if they did know, because no one inducing another to enter into a bargain can make a positive assertion of fact contrary to the truth if they are culpably negligent in not knowing the truth, and I think you will agree the defendant was in this particular case. That is for your judgment, moulding it by what you would know or ought to know in like circumstances if you were in the position of a company thus handling and dealing with lands over a period of ten years."

IX.

The Court erred in instructing the jury on the question of the statute of limitations and in refusing to give the instruction on that subject proposed by defendant.

To all of which the defendant duly and regularly excepted.

WHEREFORE, defendant prays that said judgment be reversed and held for naught, and that defendant be restored to all which it has lost by reason of said verdict and judgment.

BUTLER, VAN DYKE & DESMOND,
ARTHUR C. HUSTON,
Attorneys for Defendant and Appellant.

Service hereof is hereby admitted and receipt of copy acknowledged this 24th day of October, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
OTIS D. BABCOCK,
Attorneys for Pltf.

[Endorsed]: Filed Oct. 24, 1928. [27]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 14th day of September, 1928, the above-entitled cause came regularly on for trial before Hon. George M. Bourquin, Judge of said District Court, and a jury impaneled and sworn to try said cause and the issues presented by the complaint of the plaintiff and the answer of defendant, plaintiff appearing by his attorneys, George E. McCutchen and Otis D. Babcock, and the defendant by its attorneys, J. W. S. Butler and Arthur C. Huston; and thereupon the proceedings taken, the evidence given, the objections made, the rulings thereon and the exceptions thereto were as follows:

TESTIMONY OF EMIL JOHNSON, IN HIS OWN BEHALF.

EMIL JOHNSON, plaintiff, as a witness in his own behalf, testified:

In 1922 and '23 I lived in Minneapolis. By occupation I was a carpenter. I had never been to California and had never been in the business of raising fruit, and knew nothing about fruit-raising. [28]

About the latter part of 1922 I had some dealings with the defendant corporation. Mr. Amblad came to my house and told me Mr. Bean had bought twelve thousand acres in Rio Linda for the purpose of making homes for poor people; that Mr. Bean was a rich man and a very religious man. The places in Rio Linda were the sort of places for poultry and orchards. The land was specially well adapted for raising all kinds of fruit in commercial quantities. He said it produced large fruit of good quality in commercial quantities. He told us the land was valued from four hundred dollars an acre to four hundred fifty dollars and more.

I talked four times to Mr. Amblad. The first conversation was at my home. He gave me a book like that.

(The book, described as a copy of the Second Edition, was received in evidence and marked Plaintiff's Exhibit 1.)

I read the book and I believed the things Mr. Amblad told me, and I signed a contract to buy some of that land at four hundred dollars an acre.

(Testimony of Emil Johnson.)

I first came to California the 18th of May, 1923. Before leaving he had told me that there was a power line right on the corner and ready to hook up for the pump, and after I bought I happened to go to the office and I ran into Mr. Amblad's office and Mr. Whitcomb was there and I told him, and then I asked them what the red line was as marked on the blocks, and he said that was the power line, so I told them my lot is thirty-two in New Prague Subdivision, and that line did not go there, and I asked them about it. He said that is as far as the power line goes. I said Mr. Amblad told me the power line was right on the corner. [29]

WITNESS.—The contract provides that we could make an exchange.

(The first contract was received in evidence and marked Plaintiff's Exhibit 2.)

I saw Mr. Schei when I came here and finally selected another piece, described as Lot Thirty-five, Subdivision Five. We signed a new contract some time in the summer—some time in June.

(The contract of February 27, 1923, was admitted in evidence and marked Plaintiff's Exhibit 3.)

We looked at the second piece of land for probably a couple of hours before I signed up. The second piece of land was valued at three hundred fifty dollars an acre. Mr. Schei told me that before Mr. McNaughton took me out. There was a garage valued at four hundred fifty dollars on it, and the boring of the well was fifty dollars. I did

(Testimony of Emil Johnson.)

not make any further investigation, and signed up right away. Before I moved on the piece I started to improve it. I made a house out of the garage and moved on it that summer.

Back in Minneapolis no one had told me anything about hard-pan. Before I exchanged, when I talked to Mr. Schei and Mr. McNaughton, no one said anything about hard-pan. After that, Mr. McNaughton said the hard-pan was not injurious to the trees and was good, and beneficial, and supposed to keep the drainage. I was digging my pit and I asked him what the hard-pan was, and he said that stuff there was hard-pan and that it was good for fertilization and for drainage, to keep the moisture in the roots. I believed that and planted about sixty-five trees in 1924. The first year they seemed to do pretty good. In 1925 one died. In 1926 two died. In 1927 fourteen died. Two died this year. I gave those trees [30] the best of care, plowed and irrigated and sprayed them. The trees that are still there look very poor and runty. They are bearing some fruit, about twenty--five, thirty or fifty peaches to a tree, just a little bit of a thing. A little plums on some of the plum trees, smaller than an ordinary plum.

I planted some grapes in 1926 and more in 1927. Altogether, about thirteen hundred twenty-five vines. Probably about half of them did well. About three hundred fifty died. The rest are alive, some are doing well and some are not.

(Testimony of Emil Johnson.)

I paid six hundred dollars and four hundred dollars in cash and forty dollars up to August second. When I first came here I didn't pay anything.

Cross-examination.

I was not acquainted with Mr. Amblad or anyone connected with the company before I discussed the land with them. I had never had any business relations with any of them. Mr. Amblad first attracted my attention to the Rio Linda colony. Before I signed the contract I learned that I had some acquaintances who were then living at Rio Linda. One was Mr. Olsen and Mr. Bolding. Mr. Bolding had been a neighbor of mine in Minneapolis, and when Mr. Amblad came to my place and told me he was there, he pointed out in the pamphlet a picture of Mr. Bolding's place. I did not correspond or communicate with Mr. Bolding or anybody before coming to California. I think my wife wrote to Mrs. Olsen. She had been acquainted with her in Minneapolis. I hardly knew her myself. I don't think my wife received any reply to the letter. I don't know whether or not she wrote to Mr. Bolding.

When we arrived in California we were taken out to the colony by Mr. Schei. The first time he took me to Fisher's orchards. [31] I found a commercial orchard there. Then to Mr. Blocker's, where I found some orchards and a chicken-coop. Then over to Vineland, where I met Mr. Case and Jacob Johnson. I saw Mr. Fisher but did not

(Testimony of Emil Johnson.)

speak to him. I saw Mr. Sherfenberg the first day. I cannot recall how many places Mr. Schei took me the first day. We were riding around from one place to another.

To some extent the statement of Mr. Amblad about the power line was one of the things that influences me in buying this property. I don't know whether I would have bought it if I had not thought the power was there or not. I found that statement was not true before I left Minneapolis.

Before Mr. Amblad came to see me I had not sent any communication to the office. Mr. Amblad came to see me first. I don't remember whether the first trip to Rio Linda was on Saturday. I was out there on the Sunday following.

After I visited Mr. Bolding and Mr. Olsen I was taken over the colony by Mr. McNaughton. He showed me but two lots. I didn't find any fault. I just didn't like the location. I didn't go round with anyone else before I finally picked out the place I own.

I did not discuss the final selection of the lot that I took with any of the settlers in the colony. I did not talk it over with Mr. Bolding, or Mr. Olsen. I may have asked them a little about the colony—how they liked it. I don't think I asked anybody I met there about the fruit. I did not ask a single settler about the fruit. I only asked Mr. Schei. I asked Mrs. Olsen to a certain extent because she had fruit. She didn't tell me anything. I did not ask them anything about the soil. I didn't ask

(Testimony of Emil Johnson.)

about poultry. She was talking about poultry. I asked Mr. Bolding about poultry. He said they were doing pretty [32] well. I discussed the land and the colony with Mr. Bolding or Mr. Olsen a couple of times before I made my selection.

I put improvements on the land I finally selected right after I bought it. I have been on that land ever since I arrived in California, only I stopped on the other side probably a month.

I didn't plant anything the first year, but I did engage in the poultry business. The second year I planted some fruit-trees of quite a few different varieties. Before I planted I blasted for two trees, where the hard-pan was about twelve inches deep. I learned that hard-pan was on those lands for the first time while digging the pit, which was about two or three days after my arrival.

After my talk with representatives of the Company in the east I had in my mind the picture that the Rio Linda colony was principally devoted to raising orchards. When I came out here I actually found probably a small part of it devoted to raising orchards.

Now, as to the care of the place and cultivation, I have plowed it and disced and water it. Every time I water it I hoed around the trees. I don't water the vines, except the Thompson Seedless. Beside plowing and discing and hand-hoeing, I have sprayed the trees every year. I didn't give them any other cultivation. Last year I plowed and disced and hoed. In this year, 1928, I plowed in

(Testimony of Emil Johnson.)

the spring and disced the orchard and hoed them after they were watered.

I don't suppose my orchard is of a producing age. I don't know anything about trees and the production of fruit in commercial quantities, so I can't tell you that when I arrived here I found any orchard in Rio Linda which appeared to be producing fruit in commercial quantities. They showed me around the creek bottom land. [33] We went by Mr. Holmquist's and Mr. Quirk's cherry orchards, and we drove slow through the ground, and then he took us to Fisher's. I did not understand that there was a difference between creek land and upland. I did not know the difference when I came here. I understood the colony as a whole was all about the same, well adapted for raising fruit.

Q. And now I will ask you once more and then leave it alone. When you arrived here, where did you find any orchard in the Rio Linda district which loked to you like they were producing fruit in commercial quantities?

A. I couldn't tell you because on the Fisher and the creek bottom place Hornbrocker.

Q. How many acres did they cover?

A. I don't know.

Q. Small acres? Ten acres or such? Small orchards? A. I guess it is more.

Q. How many?

A. Possibly ten or twenty, I don't know.

Q. Outside of that when you arrived here did you

(Testimony of Emil Johnson.)

find any orchards that looked to you like they were producing fruit commercially?

A. At that time I didn't see any others, because he didn't show me anything else.

Q. During the year after your arrival did you see any orchard on this colony which looked to you like they were producing fruit in commercial quantities?

A. Well, down on the creek bottom.

Q. And about how many acres?

A. I don't know how many acres,

Q. Five hundred or two hundred?

A. I don't know.

Q. Outside of what you saw on the creek bottom, you didn't see any orchards on the Rio Linda colony that looked to you like they were producing fruit in commercial quantities during the first year you were here?

A. I went by Fisher's place and the Terkelson place. [34]

Q. I mean outside of the places that you mentioned? A. That's what I say.

Q. That's all you saw?

A. Some other. Those I saw around there.

WITNESS.—I planted wine grapes. I don't know how the soil on my place compares with the soil on the Lambert Hagel place. I have never been on the Lambert Hagel place, or on John Posehn's I have not been on any place in Rio Linda where the vines are now growing healthy and producing grapes. I have in other districts.

(Testimony of Emil Johnson.)

Redirect Examination.

As to the power line, back in Minneapolis Mr. Whitcomb said there was a mistake of Mr. Amblad. He said probably Mr. Schei can arrange so I get power line over to Lot Thirty-two.

This is a picture of my place taken last winter in February.

(The picture was received in evidence and marked Plaintiff's Exhibit 4.)

Recross-examination.

Mr. HUSTON.—Q. This picture that you have introduced in evidence is a picture taken by pointing a camera at one corner of your property that happened to be under water?

A. Absolutely no.

Q. I call your attention to this picture which purports to be taken August 25th, 1927 and ask if that represents the condition there?

A. Well, maybe it is.

Q. Is that the land in that picture, the land that you say you properly cared for last August?

A. Yes, that is the soil, the weeds growing up between the cultivation. [35]

Mr. HUSTON.—We offer this.

(Whereupon the exhibit was received in evidence and by the Clerk marked Defendant's Exhibit 5.)

TESTIMONY OF MRS. BETTY JOHNSON, FOR PLAINTIFF.

Mrs. BETTY JOHNSON, a witness for the plaintiff, testified:

I am the wife of Emil Johnson. We lived in Minneapolis in the early part of 1923. When Mr. Amblad called I was at home and heard a conversation about land in Rio Linda. He showed us different pictures—beautiful pictures of different trees and fruits and things like that. They looked very nice to us and we thought it was wonderful, and he said we could do the very same thing; that we would have a wonderful home in a short time. The soil was very rich and fertile, that we could raise anything that grows in California, and we had a little money and we said we didn't want more than five acres. He said we would have to have ten acres in order to have a commercial orchard, and there was no reason but that we would succeed. We certainly believed that. We owned a piece of real estate worth six hundred dollars that was traded in on our contract, and came to California and moved on this place.

I was present when the trees were planted. Mr. McNaughton planted the first tree. He showed us how to plant every tree and we did according to just what he said. We have given them the very best care and I have worked out there around them. They are not doing well at all.

TESTIMONY OF CHARLES T. TIPPER, FOR PLAINTIFF.

CHARLES T. TIPPER, a witness for plaintiff, testified: [36]

I have lived in Rio Linda five years. I came from Winnipeg, Canada. In 1923 I was back in Winnipeg and had never been in California. I went to the office of an agent of the Sacramento Suburban Fruit Lands Company. He told me practically the same as I had already read in the book—that it was a fine opportunity to get away from the printing business, which I wanted, and get into a land where I could grow fruit. He said the land was adapted to fruit-raising, that they could grow most anything in Rio Linda in commercial quantities.

I bought some of the land, planted my family orchard and then set out three hundred eight fig trees. Mr. McNaughton advised and assisted me in planting, which I did as he told me.

The soil varies in depth. In putting out the trees I used the ordinary spade and shovel for digging holes, and I just had to break ten or twelve of them with a crowbar on the bottom so it would average around two foot six. I didn't blast for the figs. Mr. McNaughton said it wasn't really necessary to blast; that a lot of them followed the principle of blasting between the rows a couple of years later to be sure of drainage. I have cultivated the trees since then and they have done good, bad and

(Testimony of Charles T. Tipper.)

indifferent. In the spring of this year there were seventy-six dead out of three hundred and eight. Quite a number of those have been replanted. Some of the others are in good shape, and peter out in different sections.

I think the depth of the soil has all to do with it. Where hard-pan is closer to the surface there are places where trees will grow.

I didn't do any blasting between those trees. I blasted in my family orchard. It didn't make any difference. I have had eight or ten trees die there. [37]

Cross-examination.

In my conversation with the representatives of the company before the purchase, the subject of poultry was just casually discussed. We talked poultry over, not extensively. I have had some experience in poultry, just a family flock, at home.

The thing that appealed to me was that I could buy five or ten acres of this land and come down here and engage in the commercial planting of fruit, and that would be sufficient to maintain me and my family. They told me that they had been engaged in colonization of these lands for several years. He didn't specify the age of the orchards. He said the colony was being rapidly built up and populated. I don't know that he told me that there were any orchards on the colony which were at that time devoted to the production of commercial fruit. He showed me pictures of orchards. He did not at that time in any of those conversations make any

(Testimony of Charles T. Tipper.)

statement to me with reference to any commercial orchards on the colony. When I came here I expected to find orchards devoted to the commercial production of fruit on the colony. I expected the orchards would be well advanced.

Mr. HUSTON.—Q. Within a year after you arrived here did you find any five or ten acre orchards in this colony which you undertsood were devoted to the commercial production of fruit?

A. No.

Q. What is the answer? A. No.

Q. You are a plaintiff in a similar action, are you not? A. I am.

Q. And are you contributing any money toward the maintenance of this action?

A. Not directly.

Q. Indirectly?

A. In the way that we are all contributing. [38]

TESTIMONY OF R. B. LOUCKS, FOR PLAINTIFF.

R. B. LOUCKS, a witness for plaintiff, testified:

I live in Rio Linda Subdivision six. Before I came here I lived at Amery, Wisconsin, where I had dealings with the Sacramento Suburban Fruit Lands Company. At that time I had never been to California and knew nothing about fruit-raising.

I got in touch with the agent, Mr. Whitcomb. He said they had bought twelve thousand out of forty-four thousand acres in Rio Linda, which they were

(Testimony of R. B. Loucks.)

cultivating and selling in small lots, fruit lands adapted to all kinds of fruit, very good lands, in fact, as good as there was in California, and people out here start in with chickens and fruit. He told me it was worth three hundred fifty dollars an acre. I came to California, bought some land, planted trees. The trees were planted in the spring of 1924. I cared for them. I lost a few that year, due to grasshoppers eating them, but didn't lose any more to amount to anything. In the spring of 1927 I lost twelve trees out of between fifty and sixty. One end of my orchard has soil about three and a half feet deep, then it runs down shallower to approximately a foot and a half. The character of the trees, according to the depth of soil, is very noticeable. Where I have good soil I have two rows of trees. They are about twice the size as the trees are where the ground is shallow. The larger trees on the good soil produce fruit, but not very much.

Cross-examination.

I first moved here in October, 1923. I am a plaintiff in a similar action, and am contributing to the expense of maintaining these actions.

I recognize the letter and signed the original of that [39] letter on the date that it bears.

(The letter was received in evidence and marked Defendant's Exhibit 5½.)

That letter was in my handwriting. I copied it from a letter I received from the company. Mr.

(Testimony of R. B. Loucks.)

Braughler delivered it to me. I had nothing to do with the preparation of that letter.

Q. I will ask you how the company knew about this statement: "Why, my weekly checks are larger than my monthly checks back east with half the work."

A. I don't know whether that statement was true or not.

I may have informed somebody connected with the company before the letter was written as to what my checks were.

I may have retracted the statements contained in that letter. I don't remember. I don't remember testifying that I never retracted anything.

Q. Have you ever at any time addressed any communication or said anything to the company that you retracted or withdrew any statement contained in that letter? A. To the company?

Q. Yes. A. I don't remember of it.

Q. And you filed suit on what date?

A. I don't know the exact date.

Q. Some time in 1927? A. Yes.

Q. And you have been living at the colony ever since? A. Yes.

Mr. HUSTON.—That's all.

Redirect Examination.

The letter, as near as I can remember, was written about the time it is dated in 1925. At that time I had not discovered [40] that the land was not

(Testimony of R. B. Loucks.)

adapted to the growth of fruit-trees. I thought the land was all right and the company was all right.

Recross-examination.

Mr. HUSTON.—Q. When did you discover this was not right?

A. I didn't discover at all. It turned out there was several things—

Q. (Interrupting.) When did you first have your suspicions aroused?

A. About the last of September or the first of October, 1925.

Q. And your suspicions continued to get worse?

A. There were several things came up after that.

Q. And as you have testified, you never addressed the company on that? A. I spoke to them.

Q. Whom did you speak to about this letter?

A. Nothing about the letter.

TESTIMONY OF HOWARD D. KERR, FOR PLAINTIFF.

HOWARD D. KERR, a witness for plaintiff, testified:

I am a real estate broker and have been so engaged for twenty years, and have had experience in country lands in this county. I know the value of country lands generally in this county in 1923, particularly in the month of February. I am familiar with the Rio Linda district. I don't know of any particular sales out there. I know of sales of similar land around the county.

(Testimony of Howard D. Kerr.)

I have examined the land of Emil Johnson, described as Lot Thirty-five, Rio Linda Subdivision Five. I am able to tell [41] what was the reasonable market value of that land on the 27th day of February, 1923, and I would say that a third of it was fifty dollars an acre, and two-thirds seventy-five dollars an acre.

Cross-examination.

In expressing this opinion as to value of the property I considered that the land could be used for a home by a man who wanted to raise a little diversified crops, such as vegetables, chickens and hay. I took into consideration that fruit-trees could be produced there on about six acres if the land was properly blasted and the trees properly cared for and that this land was adaptable to poultry raising. I don't know anything about the advantages the land might have by reason of the poultry association there and the service that went with it. I didn't take into consideration any advantages the land might have by reason of service from the company in connection with fruit culture.

I do not believe the lands in Rio Linda colony have increased in price from 1912 to the date at which you fixed this value. It might have increased over in the town site on the highway.

Yesterday I testified in regard to a tract of land known as the Jensen tract. That is south and east of this place, I would think, about half a mile, maybe more. I don't think the lands in Rio Linda colony have increased or decreased in value since

(Testimony of Julius Haugen.)

1912, because I *don't there* has been any cause to make them increase. This section of the colony is just the same as 1912 as to value. No matter what advantages. There might be roads and power. I don't know the condition of this particular piece of land in 1912, nor in 1911.

TESTIMONY OF JULIUS HAUGEN, FOR PLAINTIFF.

JULIUS HAUGEN, a witness for plaintiff, testified: [42]

Before I came to California I lived in Williams County, North Dakota. I had never been to California and knew nothing about California fruit-raising.

In 1923 I had some dealings with the Sacramento Suburban Fruit Lands Company, with an agent named Fotheringham. I had received some literature. Mr. Crinkley and Mr. Fotheringham told me about the climate out here and the land, and that it was adaptable for raising any kind of fruit in commercial quantities, except lemons and oranges. I don't remember that they said anything about the depth of soil or presence of absence of hard-pan. They said it was fine fruit. They said the value of the land was three hundred fifty dollars an acre.

I bought some of the land and came here, arriving the last of November, 1923. In 1924 I planted some trees on the land I bought. Where I planted the trees the soil was between three and four feet in

(Testimony of Julius Haugen.)

depth. I consulted with Mr. McNaughton and he showed me how to plant the trees and I planted them the way he said. I took care of them. I planted what is called a family orchard, thirty-four, I think. The next year they did well and the next year too. The next year, not so bad, only the cherry trees died. Out of the bunch I have one tree that looks good to me, and that is a fig tree. The others don't look so good.

Cross-examination.

I took possession of my property in December, 1923. When I arrived I engaged in the poultry business because I had a hundred and fifty chickens with me.

The top soil on my piece of land where I have the orchard is between three and four feet in depth. The shallowest is about [43] five inches. There is just a spot where the plow will hit the hard-pan. I could not say what is the average depth. I haven't tested it all over.

I asked Mr. McNaughton if I should blast for the trees and he said it wasn't necessary. If I found some place that was shallow I could blast later on.

I am one of a group that are bringing suits against this company.

In 1925 I blasted for putting down a pit. I found hard-pan before I dug the pit, but I never blasted it. The first time I found hard-pan was when Mr. Loucks plowed for me. He broke a plow. I believe that was in 1924.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFF.

HERBERT C. DAVIS, a witness for plaintiff, testified:

I am an agricultural specialist. I entered the University of California and studied agricultural chemistry, went into the army before completing my course. After that I was seven years manager for the United Orchards Company at Antelope. There we did fruit-raising and tested soils. I have been for three years and a half engaged with the firm of Techoe & Davis, and during that time have had occasion to test soil and examine tracts of land to recommend proper planting on them.

I have examined the Johnson place and made borings out there and determined the depth of soil.

I made the chart that you show me. The figures from one to twelve indicate separate borings. The other figures in parentheses indicate depth in inches to hard-pan. The cross-section at the bottom gives a correct representation.

(The chart was received in evidence and marked Plaintiff's Exhibit 6.) [44]

Above hard-pan part of the soil on the tract is a red sandy loam, and part is a grayer type, approaching what they term a 'dobe type. Clay is shown an average of four or five inches over the hard-pan over the whole tract. The clay is computed as part of the surface soil.

I examined the hard-pan itself and took samples.

(Testimony of Herbert C. Davis.)

(The samples were received in evidence and marked Plaintiff's Exhibit 7.)

These samples were taken out of the well pit and the total thickness of the hard-pan there is about twelve and a half to thirteen feet, exposed. I was not able to get below that. There are no signs of gravel in there.

I have made examination of the soil, and from all of my examinations of the land I don't think the land is at all adapted to the growing of fruit. The first requirement for successful production of fruit is depth of soil. It is considered that a depth of five feet is necessary. If you had a depth of only four feet the trees would grow, but production would be limited. You would not have tonnage and quality sufficient to overcome expenses of operation and make it a commercial proposition.

In soil as shallow as it is on this place the conditions would be about the same but even worse, because we have only about twenty-four inches of soil there. The trees would be of extremely short life.

It isn't possible to increase the depth of soil, as there is nothing within reasonable distance of the surface underlying the hard-pan in the form of soil or sand that would permit the penetration of roots or give them anything to grow in.

As to the effect of blasting on drainage, unless blasting were clear through the hard-pan in the sand, it would simply blow out a pocket and the trees would die out from drowning. [45]

Subsoiling is a technical operation that I think would have very little effect there. You merely

(Testimony of Herbert C. Davis.)

scratch the surface of the hard-pan and chip off some of it.

Q. What can you say about the surface soil? Is it ordinarily good land or rich land, or what is it?

A. No, sir. I wouldn't say so. There is no rank vegetation or indications on the plains where it is uncultivated that it is especially fertile. The grass is sparse. I wouldn't say it was rich land. I would say it is poor land.

Cross-examination.

I left school in 1918. I went into the army and when I returned from the army my occupation was farming. I returned in 1919. I engaged in grain and fruit-raising. When I engaged in my first fruit-raising I did not select land that was five feet in depth. I selected shallower soil. I have been on this tract of land during my examination once, about the 23rd of August, and outside of the borings delineated on this map and the examination of the well pit I simply took note of the condition of the trees and vines and the approximate amount of ground occupied by them, the drainage, and so forth. The greatest depth at any time bored on this tract was thirty-eight inches.

The hard-pan underlying this particular tract is fairly uniform. I examined the hard-pan in the well pit and did not try to go down any further than the bottom of the pit by boring. All I know about the thickness of hard-pan on this tract is what I saw in the well. I saw about thirteen feet of hard-pan and that eliminated any possibilities. It is of the

(Testimony of Herbert C. Davis.)

same general formation. As you approach the bottom of the pit it has a tendency to soften, due to moisture. Nearer the surface the hard-pan is dried out and [46] appears to be somewhat hard, but even the moist hard-pan is not soft enough for the penetration of roots.

Q. Then the hard-pan you are discussing in the pit is the soil that has been exposed to the air for how many years?

A. I don't know when the pit was dug.

I testified that it would take soil of the depth of five feet to grow fruit, and that in my opinion soil to the depth of four feet would not grow fruit-trees. The deeper the soil, the longer the life and more productive the tree. Trees would be less profitable as the depth decreases. I don't think they would grow profitably on any depth below five feet.

By short life I mean it is assumed in most of the deciduous fruits that the time at which they come into bearing is from four to ten years after planting, depending on the variety. Up to that point maintenance is expensive, which has to be distributed over production in later years. If your trees only live to be twelve or thirteen years, it cannot be done profitably. On shallow soil, hard-pan land, the life of trees is short. In some instances they don't live one year because of the depth of soil. They would begin to die in the first year in the shallowest depth, less than a foot, and if I saw an orchard planted on soil less than a foot deep I would expect the trees to die the first year. The

(Testimony of Herbert C. Davis.)

second year they would begin to die on soil about two feet deep, and the third year on soil three feet deep, approximately a foot to a year.

Grapes do very well on about four feet of soil. They are not profitable on less than that. In the Sacramento County and elsewhere in the Sacramento valley grapes are not being produced commercially and profitably on lands less than four feet [47] in depth. All the vineyards on that type of soil that I know of are not profitable.

I don't know anything about oranges or upon what depth of soil they can be successfully grown.

I have had experience in blasting land for the purpose of planting fruit-trees. I never recommend it and don't believe in it for that type of land. It is used on a type of land where there is a thin layer of hard-pan, not exceeding a foot and a half or two feet, underlaid with any soil or sand, so that by blasting and breaking up the hard-pan you strike a continuous strata of soil.

Q. What investigation have you made in this county where blasting has been resorted to, where hard-pan is of the same general thickness and condition as that on the property which you have specified here?

A. I have experience on my own land.

Q. But outside of that you had none? A. No.

Q. And no investigations? A. No.

Q. And no investigation whether fruit-trees will penetrate hard-pan or not?

(Testimony of Herbert C. Davis.)

A. No, except my own observations on our own land.

Q. And you have made no field observations out here in the colony? A. No, sir.

TESTIMONY OF CHARLES UNSWORTH, FOR DEFENDANT.

CHARLES UNSWORTH, a witness for defendant, testified:

I live on the Rio Linda district, and bought my place out there last October. It is located on this side of Rio Linda town site, on the main highway.

I am engaged in the fruit business out there. I have had [48] about three hundred trees covering three acres and a half. I raise poultry. The trees are mostly Tuscan peaches, but I have a few Freestone and a couple of apricot trees and five or six fig trees; a few pear trees; just enough for a family orchard. This season is the first time I have had a crop off the place.

I found the shallowest depth of soil about thirty inches. I could not say it is all less than five feet. Where we did test it it went to the end of the drill. I don't know how long the drill is—four or four and a half feet, probably.

I have trees planted on ground thirty inches in depth. I don't know whether or not the hard-pan at a depth of thirty inches is blasted where the trees are growing. The trees on the shallower soil look good. I can't see any difference between them and the trees where the soil is deeper, only there

(Testimony of Charles Unsworth.)

are a couple of trees where the fruit wasn't so large. It was good fruit, but not so large as on the deeper soil. The trees outside of this couple are of good size and good spread. There are few dead trees. The trees are all of uniform size.

I had a good crop this year. On one peach tree in particular I got five lugs. By lug I mean lug box, from forty to forty-five pounds. That is the box used for gathering fruit in the orchard. From other trees I got sometimes two, sometimes three, some more or less, I would judge about three lugs to a tree on an average. The fruit was large.

I did not sell them to the packing-house. They would not even look at the samples and said they were overstocked. As to quality and flavor, they were very good, juicy peaches.

This is a picture showing a house and some peach trees and flowers. That is a picture of my house and represents the present growth of peach trees. [49]

(The picture was received in evidence and marked Defendant's Exhibit 8.)

I would say the soil where I am located is adapted to commercial raising of fruit.

Cross-examination.

Mr. McCUTCHEN.—Q. You base this opinion on living out there less than a year?

A. Yes, sir.

Q. How many peaches did you sell in that year? How many tons, if you know?

(Testimony of Charles Unsworth.)

A. I should judge I sold about four and a half tons.

Q. Four tons and a half off how many trees?

A. Three acres and a half.

Redirect Examination.

Mr. BUTLER.—Q. You have observed other orchards around through the districts and you know something about orchards in general.

A. Well, yes, I have seen some orchards.

Q. And you have lived in California all your life?

A. Yes, sir. I have lived in California since '85.

Q. Farmed in Sacramento county before?

A. Yes, sir.

Mr. HUSTON.—That is all.

TESTIMONY OF JOHN POSEHN, FOR DEFENDANT.

JOHN POSEHN, a witness for defendant, testified:

I live in the Rio Linda district on Subdivision Six. My son, Robert, lives on the places adjoining. I have ten acres. Robert has five. I have been living there for five years next fall. [50]

I am engaged in the poultry business and have fifteen hundred chickens. That has been my principal business since living there.

The depth of soil on my property is from half a foot to two feet.

I have forty trees of different varieties in a family orchard. The orchard is planted on soil

(Testimony of John Posehn.)

from about a half a foot, a foot and two feet in depth. I blasted for the orchard, and they have grown well. I get a good crop on them. Every year it gets better and better. I have fruit off of those fruit-trees. I get all I want. I got a good crop this year.

I have some grape-vines. I brought some grapes I picked this morning. The variety there is Tokay. It came out of my vineyard. I planted the vines in 1925. I took off a bunch of Seedless on Monday, sixty pounds, and the other day I took a bunch of forty-five pounds from another Thompson Seedless. I think that's a good crop for one vine. I did not blast when I planted the grape vines. The soil is about a half a foot to two feet in depth.

I have grown grapes and fruit there. I think the soil is good soil for grapes. It seems to be well adapted for grapes. It needs working. Every soil needs some work. That soil is good soil for fruit if the ground is blasted.

Q. Where you blasted your trees do you get plenty of drainage in the hole or does the water stay there and spoil the tree?

A. It spoiled one year an apricot trees, and Mr. Leonard told me there was standing water on top from rain, and he told me I should drain that off; that we had sour sap.

We lost a peach tree the same way, but the others are all good. [51]

Where the holes were all blasted we got plenty of drainage. We didn't have sour sap, and the

(Testimony of John Posehn.)

rest of the trees were all right. We don't have water standing in the holes.

I have all the greens I want and raise vegetables and flowers. There are roses we have around the house. I got them from the Sacramento nursery, and I have roses now all summer. Roses grow well out there. The bushes are good and tall. I think that ground is rich and fertile.

These are Castor beans. They are seven feet high. We have them on the south side of the house. One I got from Nelson in Rio Linda, just a cutting. It is seven feet high.

I have ferns on the north side of my house, and if anybody buys them in the nursery in Sacramento they have to pay twenty-five cents apiece. On the north side of my house there is a pit five inches wide and thirty-five feet deep, and all them ferns grows in there.

From all the things that grow there I think the ground is good fertile soil.

I raise alfalfa and Sudan grass about five feet high, and I cut it five times. I need it for my chickens and my cow. Where the Sudan grass grows the soil is about six inches to a foot and two feet in depth. Alfalfa, the same. The soil on that depth takes up enough water to cultivate alfalfa and Sudan grass.

Q. Do you irrigate it?

A. Yes, sir. You have to keep lots of chickens, lots of minerals, lots of greens, lots of eggs, lots of money and I make lots of money.

(Testimony of John Posehn.)

Q. How many cuttings of alfalfa did you make this year? [52]

A. Six or seven.

Q. All good stands? A. Yes, sir.

Cross-examination.

I have been out there five years. I did not buy the land from this defendant company. I blasted for the trees. There is just a shallow layer of hard-pan out there.

Redirect Examination.

I do not know what is underneath, but it is good stuff.

Q. Before it is broken up, and before water is put on, isn't that hard too?

A. My son got some out and he raised his vegetables and then that he took out of the pit, he got good vegetables, everything done fine.

Q. I forgot to show you these pictures. Is this a picture of your place?

A. Yes, sir, that's a picture of my place.

Q. Is this a picture of your son's place?

A. Yes, and here is the Oriental Palm trees just the same as around this building. I planted them in 1924 and they are twenty-three feet long and about twenty-three inches around above the ground.

Q. Is this Robert's place?

A. That is Robert's place and I planted them, this section on Roberts place, and they are better than mine.

Q. The soil on Robert's place is about the same depth as your soil? A. Yes, sir. [53]

(Testimony of H. F. Bremer.)

Q. And do trees and vines do as well over there as on your place? A. Yes, sir.

TESTIMONY OF H. F. BREMER, FOR DEFENDANT.

H. F. BREMER, a witness for defendant, testified:

I live in the east end of the Rio Linda District in the subdivision known as Haggin's Park. I formerly owned another place there. We moved into the district in 1922 and at that time bought a piece of property in Haggin's Park. In that tract there are eleven and a fraction acres, almost twelve acres. When I first moved there I engaged in the poultry business and remained in that place approximately two years, and then sold out. When in possession of that property I planted fruit-trees—about fifty, would say,—a family orchard of various varieties. I blasted for them and they grew very well. They were planted in the spring of 1923.

I have seen those trees since I returned to the colony. They are doing very well. They have a crop of fruit this year. It is a pretty good crop. The size and quality of the fruit is good.

Within the last couple of years I purchased a piece of property in the same district, and again engaged in the poultry business. I have planted a few trees on this property since I returned. These were planted on blasted ground, where the depth of soil is approximately two and a half feet.

(Testimony of H. F. Bremer.)

I have some cherry trees going on the second year, and some peach and plum trees I planted last spring. The condition of the trees is very good, considering the age.

I haven't noticed any particular difference between the growth of those trees and others planted on blasted ground. [54]

Q. Do you consider that land out there in Haggin Park in Rio Linda territory adapted to the raising of fruit from what you have observed from your experience there?

A. I have observed that the neighboring colonies do not have the same kind of soil that we have, and I do not believe we could grow a commercial orchard for the reason—you wish to know that?

Q. Go ahead.

A. The reason I don't put it in I don't see where a commercial orchard is a bit better proposition than poultry.

Q. And what is that due to, the growth of fruit or the market? A. The price, the market.

WITNESS.—I have approximately twenty-five hundred birds and some baby chicks.

There are a number of orchards out there in the Haggin Park district. I don't pay much attention to it as I am entirely too busy. The orchards I have observed outside of my own place are apparently doing well where they are cared for.

Leaving the market to one side, in my opinion, that district is adapted to the commercial raising of fruit.

(Testimony of H. F. Bremer.)

Cross-examination.

Mr. McCUTCHEN.—Q. You have lived there about two years and then went away, and then you have lived there two years more?

A. Going on three.

Q. You have testified in a number of these cases, haven't you?

A. I was called by the company to come in and I had to come.

Q. How many? A. I can't tell.

Q. Have you ever had a subpoena served?

A. Not yet.

Q. You came in voluntarily? A. I did.

Q. You said you are principally in the poultry business? [55]

A. Yes, sir, I am in the poultry business.

Q. Your fruit ventures have been very much of a side line? A. The fruit I have raised?

Q. Yes. A. Merely for my own use.

Q. You have never produced any for yourself on a piece of land at the time you owned it?

A. No.

Mr. McCUTCHEN.—That is all.

TESTIMONY OF H. M. EDMUNDS, FOR DEFENDANT.

H. M. EDMUNDS, a witness for defendant, testified:

I live out in Rio Linda on the South Half of Fifty-five, Subdivision Five, west of the town site.

(Testimony of H. M. Edmunds.)

I have been living there for six years. My business is principally poultry. At the present time we have about twenty-three hundred birds. That has been my line of business ever since I have been in the district.

I hold an office in the Rio Linda Poultry Producers Association. That association is an incorporated co-operative association. Membership is confined within the limits of the Rio Linda district. Persons living outside of the district are not entitled to become members of the association.

The purpose of the association is to supply ourselves with the best possible feed at the lowest possible price. Dividends are returned to members over and above the actual cost of doing business. As to the quality of feed, nothing better can be bought. It is the practice of the association to buy the whole grain and grind and mix it. We have our own grinding and mixing machinery. The price, comparing quality, is as low as any retail price in Sacramento. Cheaper foods can be bought. We don't put [56] them out. We sell food to others beside the association members, but people outside the district cannot participate in the profits of dividends. One hundred thirty to one hundred forty thousand dollars has been returned to members during the time the association has been organized, in about eight years. I have received myself in dividends, during six years I have been a member, $1,443.50. My property cost me two thousand dollars. The fourteen hundred and some

(Testimony of H. M. Edmunds.)

odd dollars represents the dividend on purchases amounting to $15,248.00. The annual dividend is somewhere in the neighborhood of nine per cent. Every member of the association participates at the same rate.

I have planted a family orchard on my property—thirty-five to forty trees. Some of them are six years old, and some are more. Where the trees are blasted the soil is from six inches to two and a half feet in depth. I blasted for some of them, the first I put in. Where planted on that blasted ground the trees did fine until the spring of '27. They froze. That was a general condition all over the state. I lost six or eight trees at that time. Their condition when I lost those trees by frost was fine. They were in a perfect mass of bloom and in forty-eight hours they were black as the dirt from which they sprung. The balance lived and have done well.

The crops have been fine this year, plenty for our own use, plenty over to mail. We have never attempted to sell back east, because it is a losing proposition. There is no market in California. Everything is overdone in the fruit line. There is no question of quality when I say "losing proposition." It is just the market. Aside from the market, that land is adapted to commercial raising of fruit. It can't help but grow. [57]

I have an acre of grapes that are doing well. I put them in in the spring of '22. I have a crop of grapes off them. They bear fine.

Where trees were planted on unblasted ground

(Testimony of H. M. Edmunds.)

the depth of soil is, I would say, from one to two feet. They are four years old. Where the trees were planted on ground less than a foot in depth, unblasted, they did not die out at the end of one year, and where they were planted on two feet of soil they did not die out at the end of the second year. I haven't lost any of them. They are still growing there at four years.

I am acquainted with the location where the property of Emil Johnson is situated. I know the general district and the Johnson district in particular. I know the values of land there for the purposes for which they are adapted.

Q. What in your opinion would be the value of land in the district in which the Emil Johnson property is located in the month of February, 1923?

Mr. McCUTCHEN.—Objected to as incompetent, irrelevant and immaterial, and the proper foundation not laid.

The COURT.—I hardly think the competency of the witness has been shown. Objection sustained.

Mr. BUTLER.—Exception. That is all.

Cross-examination.

I am friendly with the Sacramento Suburban Fruit Lands Company. I bought my land from them. I am the head of this Rio Linda Poultry Producers Association. Our prices are as low as any, comparing quality. The price of Egg Mash No. 1 this morning is, I [58] think, $2.75. I don't know whether the price of Egg Mash No. 1 of the

(Testimony of J. S. McNaughton.)

Producers of Central California is $2.65 this morning. At times there is a difference of ten or fifteen cents in their favor. At other times it is reversed.

TESTIMONY OF J. S. McNAUGHTON, FOR DEFENDANT.

J. S. McNAUGHTON, a witness for defendant, testified:

I am the horticultural adviser of the Sacramento Suburban Fruit Lands Company and have been acting in that capacity for a little over eight years. I know Mr. Emil Johnson. I met him when he first came here to look over the territory. I haven't any recollection now where I took him, except one lot, Lot Seventy-seven Rio Linda Subdivision Five, and the lot that he took afterwards. I don't remember how much time we put in on that trip of inspection. I know the lot that he owns, Lot Thirty-four. I have observed it from time to time as to the care and attention bestowed on it, particularly this year. I noticed there wasn't any cultivation in the vineyard until after the 15th of April, which was too late to conserve any moisture. The vines had not been worked around by hand as they should have been. They were simply disced up. All that has been done this year is dry discing.

In a locality such as the Johnson property, in the way of proper care and attention to vines, they should be plowed and harrowed, and the vines worked around individually to get the weeds away

(Testimony of J. S. McNaughton.)

and get the dirt loose around the vine as soon as you can get on the ground in the spring after the rains are over, usually in March. If you do not do it at that time it gets too dry. That is what happened this year with the Johnson vineyard. There had been no cultivating done around the vines in removing the weeds or digging around the vines at all until after the 15th of April. [59] I don't know what care and attention he has given it in years past.

TESTIMONY OF LAMBERT HAGEL, FOR DEFENDANT.

LAMBERT HAGEL, a witness for defendant, testified:

I have lived in the Rio Linda district in Subdivision Six a little over five years. I have forty acres in my place. I have fifty-eight fruit-trees, thirty-six different varieties, constituting a family orchard. I have no commercial orchard.

The depth of soil where the fruit-trees are planted is from seven up to twenty-four inches. I blasted where I planted my fruit-trees, in the holes where the trees would sit. The trees have had a wonderful growth. I have sixteen cherry trees, the diameter of the trunk from two and a half to three and a half inches. I have one nectarine tree on the ground. The trunk is six inches, the height I don't know. The trees have wonderful leafage. They are pretty high for the age. They have made a

(Testimony of Lambert Hagel.)

good growth and bear good fruit. The nectarines I have about three lug boxes apiece—nectarines of wonderful size, as big as I have seen, and so are the apples and cherries. The rest of the fruit was not so good. It was a fair crop for the age of the trees. I got sufficient for the use of my family and more over.

I have twenty-eight acres planted in grapes in what I call my commercial orchard, or commercial vineyard. The vines are from one year old to three and a half years. I have never put a drop of water on since I planted, and there is the result. That is a Carignane. The Carignane in general are fairly good. Some of the vines haven't as much on as this, of which I took a fair sample. Some have more. [60]

The depth of soil runs from six inches to thirty-two. I did not blast for the vines.

This picture was taken on my place.

(The picture was received in evidence and marked Defendant's Exhibit 10.)

This is what is called Thompson Seedless. This cutting is from this year's growth. Thompson Seedless grows in long runners, a little longer than any others, especially if you give them good care. This is twenty-four and a half feet long. It is one year's growth.

I have samples of vegetables grown on my place. Here is a pepper I pulled out this morning from my vegetable garden. Here is an eggplant. Here is a melon I picked last night off my field a quar-

(Testimony of Lambert Hagel.)

ter of a mile away from the house. I have many melons out there and they never had a drop of water because now water goes into my vineyard. Here are some pomegranates and here are a couple of walnuts. Here is a cluster of Tokays. This is irrigated. I keep it close to my trees and I can't keep the water off. Here is a cluster of Thompson Seedless off the vine.

From my experience out there I am satisfied I can grow anything I want to. My vegetable garden is in good shape.

I am engaged in the poultry business. I have fourteen hundred hens. I raise all the greens I want for my chickens. I raise alfalfa. Where it is planted the soil is from one to two feet deep. I cut it eight times this year. As a rule I let it grow about eighteen inches high and cut it while it is still tender. I raise alfalfa satisfactorily on that land.

I know the location of the Emil Johnson place. It is about a mile and a half from my place. [61]

Q. Do you know any reason why you cannot raise fruit and vegetables and grape-vines on that soil the same as you have on yours with proper attention?

Mr. McCUTCHEN.—Objected to. I don't think the question—he says, "Do you know any reason," why he couldn't.

The COURT.—Sustained. He says he doesn't know anything about it.

Mr. BUTLER.—Exception. That is all.

(Testimony of Lambert Hagel.)

Cross-examination.

I have been here and testified for this company in several actions. I was not subpoenaed to come here to-day. I wanted to come in order to defend my own property.

Those blue grapes on the first bunch are the Carignane. That is the normal size. That grape is not generally as big as a Tokay.

I have fruit-trees for family use. I never sold any fruit off of those trees. The land is principally planted to grapes. I believe in grapes more than anything else because there is no place for other tree fruits. I had twenty-eight acres planted to grapes last year, nine in berry. Off of nine acres last year I got between four and six tons. They were two and a half years old. I have bought other grapes and sold them again.

Redirect Examination.

Those grapes that I bought were for resale. I bought them on the field and sold them on the field.

TESTIMONY OF E. P. VERNER, FOR DEFENDANT.

E. P. VERNER, a witness for defendant, testified: [62]

I am engaged in the real estate business in Sacramento, associated with the firm of Wright & Kimbrough, in charge of the country land department. My particular business is the buying and selling of

(Testimony of E. P. Verner.)

fruit lands. I have been in that business seventeen years.

I am familiar with the Rio Linda district and know the values of properties in that district.

I am acquainted with the Emil Johnson property, and the reasonable value of that property on an acreage basis. It is three hundred seventy-five dollars an acre, without the improvements. I would say it was of the same value in the month of February, 1923. I have taken into consideration the valuation of real property out there, have seen the fruit and vines growing through the district. One very important consideration is location. Its location is within eight and a half or nine miles of Sacramento, between two transcontinental railroads, and the local electric road running halfway between the two, which makes it easy for settlers to come back and forth to town, if they wish to commute, and another very important thing is that it is on high land, above any flood district. Last winter between here and North Sacramento, and as far as five miles above, it was necessary for a great many people removed from the electric transportation to travel twenty-five miles to arrive in Sacramento, whereas in the Rio Linda section they could get on the electric car and come to work. I considered the question of roads, highways, power lines, churches and schools, and that it is a settled community with a uniform line of industry and the availability of power and water.

I am familiar with the Carmichael district and

(Testimony of E. P. Verner.)

have made [63] sales of property in that district. I sold a parcel of thirty acres in the Carmichael district to Mrs. Lily I. Babcock, and know the fruit production on that property. Approximately twelve acres of that are planted to Washington Navel oranges; about an acre and a half of grapefruit, and probably an acre of Imperial prunes. The depth of soil on that property is from eighteen inches to about thirty-six inches. Where the trees were planted the ground was blasted and puddled. That is hard-pan land. The last three years the orange crop alone has been producing around thirty to thirty-five tons, the crop, the twelve acres. The lowest estimate for the '28 crop is fifty tons, and the highest estimate seventy-five, of shipping oranges.

Cross-examination.

I have an opinion as to the relative valuation of land in Fair Oaks District to the land in Rio Linda. Fair Oaks is eighteen miles from Sacramento. You must consider location. The Rio Linda lands have a greater value, because they are close in.

The average price of all California lands has increased approximately twenty-five dollars an acre from 1920. I could not say how much they increased from September, 1921, to February, 1923, in that district.

I have no recollection of any discussion with Mr. Johnson. I have had him pointed out several times, but I have no recollection of any conversation with him. I did not tell him that if he paid two

(Testimony of E. P. Verner.)

hundred fifty dollars an acre for that land in Rio Linda, he paid too much. We have lands in Fair Oaks—twenty acre tract, listed at twenty-eight hundred dollars.

TESTIMONY OF R. O. BOLDEN, FOR DEFENDANT.

R. O. BOLDEN, a witness for defendant, testified: [64]

I live in the Rio Linda district and have been there for seven years. I moved in there in the fall of 1921.

I am acquainted with Mr. Emil Johnson, and I remember the time that Mr. Emil Johnson arrived in Rio Linda. Before his arrival there I received a letter from Mr. Emil Johnson, asking for information about Rio Linda. I looked for the letter last night but couldn't find it. I remember he wrote to me regarding the Rio Linda district and I answered him as far as I was concerned I liked it all right out here, but I don't say it would suit everybody, and he would better come out here and look over the land himself before he bought. After he arrived he stated to me that he had received the letter.

Cross-examination.

It is not a fact that the letter came from Mrs. Johnson.

I have never made any sales for the Sacramento Suburban Fruit Lands Company, and never received any commissions from them.

(Testimony of R. O. Bolden.)

I live on the west side of the town site and am staying on the place, as I have done ever since I came out. I did not have any other conversation with Mr. Johnson about this land.

TESTIMONY OF LOUIS TERKELSON, FOR DEFENDANT.

LOUIS TERKELSON, a witness for defendant, testified:

I live on the boulevard in Rio Linda, this side of the town site. I have been there for fifteen years. Before moving to Rio Linda I lived in Southern California, where I was engaged in fruit raising. I have been engaged in fruit raising ever since I have been in Rio Linda. I have forty acres of upland. The depth of soil is from three to eight feet. I have a good many varieties of fruit, but my principal crop is almonds and pears. [65] I have about three acres in pears, and have just a medium crop this year—I should think, about seven and a half tons. The reason for its being a medium crop this year, as compared to a better crop in some other years, was the weather conditions in the spring. Last year we did not have a good crop. They were pretty near a failure over the State. The year before that we had a very heavy crop. I shipped about seven hundred boxes at the rate of fifty pounds a box, and three hundred boxes I did not get shipped, because they closed down the packing-houses. I think there were around fifteen or twenty tons on the trees that year.

(Testimony of Louis Terkelson.)

I have about twenty-three or twenty-four acres in almonds. My pear trees are about thirteen years old. The almond trees are from thirteen to fourteen years old. About eleven acres of almonds are in bearing. I generally have a good crop. This year the crop is just medium on account of the heavy rains in the blooming season.

I consider that land good fruit land and adaptable to the raising of fruits.

I know the orchard of Mr. Unsworth. It is right across the road from me. I think his orchard is fine for fruit.

TESTIMONY OF F. E. TWINING, FOR DEFENDANT.

F. E. TWINING, a witness for defendant, testified:

I live in Fresno. I am an agricultural chemist and maintain there a laboratory for the examination of soils. That laboratory is the most completely equipped commercial laboratory on the Pacific Coast. [66]

In my practice I am called upon to make examinations of soils to determine their adaptability to certain purposes, particularly in the growing of fruits.

I have made investigations and tests throughout the Rio Linda district. I have made over three hundred borings and tests and subjected the borings to chemical analysis to determine the content of the soil.

(Testimony of F. E. Twining.)

I have been on the particular tract known as the Emil Johnson tract, and have made borings there to determine the depth of soil. It runs from eight inches to three and a half feet. I found two spots of a depth of eight inches. The place will average in depth from two to two and a half feet.

I examined the character of the top soil and found hard-pan underlying. I have taken samples of the hard-pan. This is the top layer of hard-pan, the indurated portion impervious to moisture, under which the portion absorbs water readily. The impervious layer on top is a thin shell. It is cemented with a hydro-oxide of iron, carried down by moisture from above. That thin top layer prevents the water from penetrating. It varies from a sixteenth to a quarter of an inch, and if the top layer is removed water will penetrate the hard-pan. If it is broken up and thrown out on the ground and exposed to the air and elements it will disintegrate and will not re-cement and will become practically the same as the surface soil. If the top impervious layer is broken up by blasting, the underlying hard-pan will permit the absorption of water for maintenance of plant life, and also permit drainage of the surplus water.

I have made an analysis of the hard-pan, as well as the soil, and it is very little different in the actual constituents [67] except organic matters. The deeper layers of soil don't contain organic matter, by which I mean decomposing vegetation. That is necessary for the maintenance of plant life.

(Testimony of F. E. Twining.)

The plants feed in the upper layer of soil. Most of the plants get their food, constituting lime, potash, iron, magnesia, and so forth, from that area. The idea is to have a sufficient amount of soil to hold a sufficient amount of moisture for the growth of the plant. That is the necessity of depth, so the roots can go down.

I have been in this business a good many years and have given advice in the planting of orchards through the state in a great many instances. I have examined thousands. I am familiar with all the standard and recent works on the subject of plant growth and horticulture. I know of no arbitrary standard set by horticulturists setting five feet of top soil as an essential for the growth of trees. There is no arbitrary standard of any kind.

I do not know it to be an accepted fact that trees planted in one foot of soil on top of hard-pan will die at the end of one year, and in two feet at the end of two years, and in three feet at the end of three years.

I have known plants to live for several years on one foot of soil, and to die the first year on fifty feet of soil. I have made a chemical analysis of soil of varying depths on this tract of land. I have found the phosphoric acid constituent to be .21 of one per cent, 8,400 pounds to an acre-foot, and .57 of one per cent of potash, which is 22,800. That is ample to sustain plant life over a period of years. Plants will use fifty to one hundred pounds of potash per acre, and twenty-five to fifty pounds of

(Testimony of F. E. Twining.)

phosphoric acid per acre a year. I have made a general examination over the Rio Linda project and from my examination of the [68] Emil Johnson tract, my chemical analysis and my investigation of the soil, my knowledge and experience, I would say that soil, properly prepared, is adapted to the raising of fruit. By "properly prepared" I mean that in places that are shallow it will be necessary to blast and loosen up the subsoil, and where the soil was blasted where necessary, the Emil Johnson ground will grow fruit in commercial quantities. I know of nothing outside of the physical condition, the necessity for blasting, that would prevent the growth of fruit on that tract. I know of nothing detrimental in the soil to the growing of fruit.

(An exhibit of hard-pan was received in evidence and marked Defendant's Exhibit 11.)

Cross-examination.

I have made quite a number of similar examinations of soil for the defendant on the Rio Linda district, and also on some of the adjoining districts. I came from Fresno to make them. I have not had a lot of experience making soil analyses for colonization projects down that way. We made an alkali survey of over fifty thousand acres of Chowchilla land.

As to how this Johnson property compares with the Wellnitz property I would have to look that up. There is not very much difference in the soil.

(Testimony of F. E. Twining.)

I do not concede that the Wellnitz place was a very poor piece of land. As I remember, there was some shallow soil that would necessarily require certain treatment.

I have made a lot of chemical analyses out there and always come in and say the soil has all the chemicals necessary to produce proper tree life. I observed the general character of the uncultivated land in the Rio Linda district. In some places the vegetation is very sparse. In some places it is good. They [69] can't grow vegetation where there is no water. In the uplands the blades of grass are not six inches apart; they are very dense in lots of places. I would say this Johnson land was well adapted to the growing of peaches, not without preparation. The preparation necessary in shallow soil to loosen it up.

I would say it is well adapted to the raising of pears and apricots, but not so well to cherries. I wouldn't advise raising of cherries. They will grow there.

Q. Considering the depth of soil, two and a half feet on the average, would you say that is good, real good commercial orchard land?

A. It requires loosening up, of course. It won't hold enough water in that condition to run through it. Of course, trees will grow on two to two and a half feet of soil; that is, if properly watered. It is not necessary to blast. You can grow big trees on one foot of soil.

(Testimony of F. E. Twining.)

Q. Don't you think they would blow over in the wind?

A. If it was loose soil and the roots were all within one foot, they would blow over. I have seen in sandy soil where it was fifty feet deep, trees fifteen to twenty years old. The trees would blow over when they only have a few feet of root surface.

Q. Taking the general commercial orchard in California, that doesn't compare favorably, does it?

A. Well, I might state that the best orchards in California are on soil deeper than a foot and a half to two feet.

Redirect Examination.

Q. Take that Emil Johnson lot out there, you know the hard-pan, the thickness and condition. What would it cost per vine or per tree to blast that? [70]

A. In order to crack that up in good shape I would say twenty-five to thirty dollars an acre; maybe a little more. There are some places it is pretty close.

Q. Do you know anything about the underground water supply in that locality?

A. I don't know exactly what it is, but I know it is over fifteen or sixteen feet at that point.

Q. And is there, from your knowledge of conditions there, an ample underground water supply at that depth?

A. It must be pumped out. There is no connection with the underground water. The water must be put on the surface for plant growth.

(Testimony of E. H. Traxler.)

Q. If that water is put on the surface and plant growth is irrigated, it will grow? A. Yes, sir.

TESTIMONY OF E. H. TRAXLER, FOR DEFENDANT.

E. H. TRAXLER, a witness for defendant, testified:

I am engaged in the real estate business here, and have for a long time specialized in farm lands and country property. I was associated with the Ben Leonard Company from the time it was organized. At the present time, however, I am operating independently. I am familiar with the district known as Rio Linda. During the time that I was with the Ben Leonard Company they were owners of a tract of land in the immediate vicinity of Rio Linda, adjoining the colony to the south, and I was familiar with the land known as the Arcade Park district, and was familiar with sales of lots in the Arcade Park district, and sold a good many. The conditions there as to depth and quality of soil are about the same as throughout the Rio Linda district. Both were parts of the old Haggin Grant. [71]

I know of orchards planted on the Arcade Park district. Mr. Stout has eleven acres planted right close to the highway on hard-pan land, where he placed peaches, prunes and apricots and his family orchard. There isn't any finer orchard anywhere in the country than he has, and he never put a drop of water on it until about the fourth year. Raised

(Testimony of E. H. Traxler.)

it by good cultivation, and well taken care of, and pruned, graded, sprayed, plowed, harrowed, pruned it all season. I have gone there in the middle of July and kicked the dry dirt off the top with my toe and there is the moisture. That was good farming. That is six or seven years old, and I believe he has picked six tons to the acre and received eighty dollars a ton from Libby, McNeil & Libby. The grade was number one.

Frank Orr has a wonderful orchard of peaches, plums, apricots and cherries. The depth of the soil was from two and a half to three feet, all blasted. The growth of trees was very fine. He gave them wonderful care, pruning, spraying, cultivating, irrigating. The class of fruit was number one, thinned down.

I don't think the land was a bit better than the Rio Linda district.

I am familiar with this Emil Johnson property. I have seen the property, Lot Thirty-five of Rio Linda Subdivision Five. I have known the Rio Linda district for a great many years. My opinion of the reasonable value of that lot in the month of February, 1923, I would say, would not be out of the way at four hundred dollars an acre. I would consider in fixing that valuation that it is close to a growing place like Sacramento, the transportation and the help that the people are given there in their different lines, whether raising fruits or raising chickens. By [72] help I mean the advisers paid by the Rio Linda company, and by transporta-

(Testimony of E. H. Traxler.)

tion, I meant the railroad transportation and the roads and highways throughout the district.

I know the water conditions. I have helped put down several wells. The water level is about the same. It depends on the land and the depth of soil. The deepest well for irrigation in that district is one hundred twenty-four feet. There is an ample underground supply of water there to be had by pumping. There is power for pumping. It was the finest water in the world.

Q. Comparing again the lands in the Arcade Park District, what were those lands sold for?

Mr. McCUTCHEN.—Objected to as incompetent, irrelevant and immaterial.

Mr. BUTLER.—Withdrawn. What was the reasonable value of that land on an acreage basis, in the Arcade Park section?

Mr. McCUTCHEN.—Same objection. He is cross-examining his own expert.

Mr. BUTLER.—I think I have the right—that is withdrawn.

Q. Do you have in the Arcade Park district any advantages which they have in Rio Linda?

Mr. McCUTCHEN.—The same objection.

The COURT.—Sustained.

Mr. HUSTON.—Exception.

Cross-examination.

I was *interest* in selling the Arcade Park Subdivision. I have no longer any interest in it. I sold out a year ago last March. I did have a lot

(Testimony of E. H. Traxler.)

of stock in the buying company, but I haven't it now. I have no interest in keeping up prices in that locality. [73]

I have advised loans on places out there. I have advised people to loan money on the land—a great deal of the Rio Linda land.

I am very friendly with Mr. Bush of the Ben Leonard Company.

Q. This production of the Stout place, did you stay there and see that fruit weighed and measured in some way, or are you going on what somebody told you? A. I know the man.

Q. You know Mr. Stout, and you are going on what he has told you? A. Absolutely.

Q. The same is true of the other places you mentioned? A. Yes, sir.

Q. Where you put the price of four hundred dollars an acre on the Emil Johnson place, you are considering what that place has been sold for to Mr. Johnson?

A. No. I don't know as I know what it was sold for.

Q. Do you know of any sales out in that district around 1923 except made by the Sacramento Suburban Fruit Lands Company?

A. Yes, sir. There are many sales made. I would have to go up and look up old records.

Q. You don't recall any individual one?

A. Yes, sir. They sold lots of land out there.

Q. You say you considered the help given the people? A. Yes, sir.

(Testimony of E. H. Traxler.)

Q. You mean this supposed horticultural adviser? Did you take into consideration the fact, if such it be, that these people have no absolute right to that, that that is a privilege that may be withdrawn at any time.

A. Well, they surely gave it to them.

Q. Do you take that into consideration?

A. I surely do. [74]

Q. You consider it might be withdrawn at any time?

A. I don't know as it would, but it never has been.

Q. You are assuming they would have it all the time? How much value do you put on that? How much does that add to the value of the land?

A. If you had to go and employ a man to come and teach you how to do it, it would cost several dollars a day.

Q. I want to know how much of this four hundred dollars an acre you set aside for this?

A. It has been running a good many years. You will have to pro rate it.

Q. You are the man that is giving the opinion. I wish you would answer that question.

A. I would consider it was almost worth as much as the land was worth to have a man come and tell you how, give you advice on running the place, if you come in here a stranger.

TESTIMONY OF ARTHUR MORLEY, FOR DEFENDANT.

ARTHUR MORLEY, a witness for defendant, testified:

I live in the Arcade Park district, just south of Rio Linda. I have sixteen or seventeen acres. My place is bordering the south or the east of the tract, about a mile from the Sacramento Suburban Fruit Lands. The character of the land where I am living is about the same as it is throughout the Rio Linda district. I have been all over that district rather extensively, and have made a careful investigation of it, and know what the soil is in Rio Linda.

On my place I am raising plums, pears, peaches, apricots and cherries. The depth of soil on my place averages from about a foot to three feet. The soil on my place is blasted for trees. [75] They have done very well. My trees are about ten years old. I have been engaged in the fruit business about fifteen years, and in different localities. I have also some other orchards out there in my charge—one of thirty acres, another of twenty acres. I have been caring for them for several years. I have occasion to plant young trees and care for them in a nursery on shallow ground. I know of no rule among horticultural writers setting a standard of five feet of depth necessary for the growth of fruit-trees, nor of any rule that requires a tree to die at one year when planted on one foot

(Testimony of Arthur Morley.)

of soil, or two years when planted on two feet. The trees on these places adjoining mine have all done well—planted on soil of similar depth and blasted, with hard-pan underneath, just about the same as in the Rio Linda district. There is nothing that I know of in soil of that character or that depth injurious to the growth of fruit-trees. The crops on my place, and these other places, are heavy. The trees are bearing well and the size and quality of the fruit is good.

I have recently gone through the Rio Linda district with Mr. Jarvis on an expedition extending over thirty days to observe the conditions there, and have seen fruit-trees growing around the Rio Linda district, and have noticed the fruit-trees and the conditions under which they are growing, the care and cultivation, the depth of soil, and where blasted or not. The growth of fruit-trees in the Rio Linda district is good if properly taken care of. Where I found an orchard properly planted and cared for, it has been doing well. Where I found a lack of care, I found a corresponding appearance in the orchard.

We made an investigation to determine whether or not fruit-trees would penetrate into hard-pan after it had been blasted. [76] We made an excavation alongside of three different trees where the ground had been blasted, to see whether the roots did go down and penetrate. These are pictures of the excavation where we made that experiment. The roots shown in these pictures are penetrating

(Testimony of Arthur Morley.)

into the hard-pan. The depth of soil where these trees were planted was about one foot over the hard-pan. There is a layer of hard-pan in each one of these pictures that is broken and shattered by blasting.

(The pictures were received in evidence and marked Defendant's Exhibit 12.)

Q. Now, in your opinion, do you consider the area known as Rio Linda, when properly prepared by blasting and the hard-pan broken up, adaptable to the raising of trees? A. Yes, sir, I do.

Q. Any reason why it won't grow fruit as well as the district in which you are located?

A. No, sir.

Cross-examination.

Q. You have stated you believe the Rio Linda district is adapted to the growing of trees?

A. Yes, sir.

Q. And upon what do you base your opinion?

A. Because you see it bearing trees there.

Q. Where? A. All over the district.

Q. Name one.

A. On one place, the Hansen orchard, it had fruit ready to pick.

Q. Name another place.

A. The Seidenstricker. [77]

Q. Another one. A. The Case place.

WITNESS.—On the Hansen place are planted prunes, grapes and peaches. I don't know how much they raised there last year, nor the year before.

(Testimony of Arthur Morley.)

I know what's on the Seidenstricker place, but I don't know anything about the history of the tract, nor how much was raised last year, nor the year before. I know there was fruit there this year ready to pick. It was a good crop, of good quality. I was shipping fruit of the same quality at that time.

Q. Now, on this place here, where you showed the olive trees growing, may I ask you, Mr. Morley, if there is any reason why you selected an olive tree?

A. We knew it had been blasted. We wanted to see how the roots travelled down through that blasted area.

WITNESS.—There is not much difference between the character of an olive tree root and an apricot. It is not particularly more fibrous. As to the depth of hard-pan in that tract, we went down four feet and it was still hard-pan. I don't know anything about the history of the Smith place. I don't know that Mr. Smith has practically abandoned that as a commercial orchard. I couldn't tell you. He is living there. There were crops this year, but not very much, because the weather condition spoiled all of the olive crop.

I have made about three hundred investigations for the defendant company in Rio Linda in about thirty days. We went out on a tract of land, bore down to see the depth of soil, and to see the condition of the trees, and note the care they had been

(Testimony of O. W. Jarvis.)

given, whether they had been sprayed, cultivated and irrigated properly. We did not examine the depth of the hard-pan. [78]

TESTIMONY OF O. W. JARVIS, FOR DEFENDANT.

O. W. JARVIS, a witness for defendant, testified:

I have been in the horticultural business for a a great many years, as an adviser and practical man. I am a graduate of the Utah College of Agriculture, and then was Farm Adviser for Sacramento County for a time. I have lived in Sacramento County for ten years, and during all that time I have been engaged in horticultural work. I know the territory known as Rio Linda.

I was specially employed by the Sacramento Suburban Fruit Lands Company to make a survey and report, and that is my only connection with them.

With Mr. Morley, I spent some time in going over the Rio Linda project for the purpose of examining the depth of soil where fruit was growing, and to determine the fruit conditions in the tract generally. I made an estimate of the number of fruit-trees growing in the colony. We had a map of the district, and, knowing the acreage of each tract, we had it on the map, and made an estimate as close as we could of the acreage of various fruits on that particular tract, and later we estimated, knowing whether the trees were eighteen, twenty, twenty-two

(Testimony of O. W. Jarvis.)

or twenty-five feet apart, the number per acre, and we made an approximation of the various kinds of fruit and a total for the district.

Our findings as to the number of trees growing in the district, outside of family orchards, are as follows: Almonds, 18,700; olives, 9,370; peaches, 7,060; plumbs, 2,950; pears, 8,875; prunes, 2,040; figs, 16,230; grapes, 97,650; apricots, 1,550; walnuts, 490; cherries, 9,465; apples, 600; persimmons, 100. Total number of fruit-trees outside of family orchards, 83,650, and about 8,100 in family orchards, making a total fruit-trees in the colony [79] 91,-750, and the total number of vines, 100,900.

We found conditions flourishing from one end of the district to the other. We found good, bad and indifferent trees grown on similar and dissimilar soils. From the east and to the west and the north to the south, where they had been given the best care, invariably we found good trees. Where they had been given indifferent care, naturally you would expect to find poor trees, although we found good trees in spite of apparent neglect, and some trees that had died on account of climatic conditions or weather or poor drainage, where the owners said they had given them good care. Under general conditions, where the trees in the orchards had been cared for, we usually found good trees with good crops.

I am familiar with the depth of soils throughout the district generally. From my experience, in that depth of soil, with proper preparation, blasting, and

(Testimony of O. W. Jarvis.)

so forth, the soil in my opinion is adapted to the commercial growing of fruits. There is nothing that I know of, aside from the physical condition, necessitating blasting, that would interfere with the growth of fruit in that district.

I was with Mr. Morley at the time the excavations were made by the side of these three olive trees. I myself made excavations by the side of other trees to find whether the root growth did penetrate the hard-pan after blasting. These were plum trees. I found conditions very similar to these in connection with the olives.

I did not investigate as to other kinds of trees in this district. I have in other places. I have seen peaches, pears, apricots, with roots growing in hard-pan where properly blasted; not so thoroughly as I have here. It has been incidental [80] to other work, but I have seen the fact.

I am familiar with other districts in the Sacramento Valley. I am familiar with the fruit district of Oroville. There are orchards up there planted in hard-pan land of a depth of a foot and a half to two feet. They will run from one foot up to three or four feet on one tract. You don't often find a whole tract with soil as shallow as you speak of. I find orchards of trees planted on soil up to a depth of a foot and a half in the Oroville district. That is usually blasted. There is the same kind and character of hard-pan there as in Rio Linda. I find the same kind and quality of hard-pan in the valley as I do in the Rio Linda district. There

(Testimony of O. W. Jarvis.)

are a great many orchards planted there—citrus orchards, figs, apricots and olives. The figs do well, and olives. That is one of the leading olive districts of the state.

I found the trees planted on all kinds of soil, and found them in shallow soil. I found oranges growing there. The period of marketing these oranges around Oroville comes in way ahead of oranges from the south. They grow a very good quality in shallow soil. They get a good price. There are large areas in Sutter County which are well recognized peach growing districts. Near the Feather River you get good soil. There are thousands of acres of peach orchards producing heavy crops in soil running from two and a half to four feet, and some still shallower. I have found a number of borings shallower than two and a half. These are underlaid with hard-pan and usually blasted for planting, when they come anywhere near the surface. Peaches grow and deliver crops of number one quality on this shallow hard-pan land after they have been planted.

There is no reason that I know of, or any practice among [81] horticulturists, or any rule advanced by any writer, setting the arbitrary standard at five feet of soil as necessary for the growth of fruit trees. I have heard a few people give that theory, but there is no accepted standard of that kind. In practice, the contrary has been proven. I never heard of any rule that trees planted on the soil to the depth of one foot usually die at the end of

(Testimony of O. W. Jarvis.)

the first year, and I never heard that the life of trees planted in two feet is two years.

Cross-examination.

The depth of soil is important in determining whether it is adapted to growing fruit-trees. There are a good many important factors. If there was five feet of soil on the Johnson place, I think it would be better adapted to the growing of fruit. The shallower soil is more difficult to handle, requiring greater care in the application of water.

There are thousands of acres of peaches in Sutter County grown on soil only three or four feet deep, and even shallower, with blasting where hard-pan comes close to the surface. I have examined the hard-pan. I haven't been clear through. I have been down in a number of places where they were blasting. The prevailing practice was to blast and then turn water into the hole, and if water runs out through, then they have open drainage. If it doesn't, then they have to blast again.

I made an examination of these lands out there about June, 1927; spent two days out there, yes. We were on the Klaffenbach place. I don't remember if Mr. Klaffenbach asked me to go out and test the soil. I don't remember stating to Mrs. Klaffenbach and the others present that there wasn't any use getting out and testing that soil; that it was only a couple of feet [82] deep and was not adaptable to the commercial raising of fruit.

(Testimony of O. W. Jarvis.)

I know the plaintiff in this case, Emil Johnson, and I was on his place and tested the soil there. I don't remember making any statement that his land was not adapted to the commercial raising of fruit. I remember distinctly telling a number who asked that we were making an examination for the District Attorney, and we would make our report when the investigation was completed and not until then, and we could not make any communication until we had finished it, and would not make a report until the investigations were complete.

TESTIMONY OF L. B. SCHEI, FOR DEFENDANT.

L. B. SCHEI, a witness for defendant, testified:

I am the resident secretary of the Sacramento Suburban Fruit Lands Company, and have been acting in that capacity since 1916. I am acquainted with Mr. Emil Johnson, the plaintiff in this case. I was resident secretary when Mr. Johnson first came to Sacramento. I met Mr. Johnson at the time of his arrival and made a trip with him out over the territory.

Q. Will you describe that trip to us and tell us where you went with Mr. Johnson, what places you took him to and what happened?

A. Mr. Johnson told me that he had known of Mr. Bolden and the Olsen family, and I took him out into the country that day, going I believe directly to the Bolden place, and then to the Olsen place,

(Testimony of L. B. Schei.)

and following that we went over to Lot Thirty-two in New Prague, which is not a great distance from there, I presume a mile or a mile and a quarter, which is the lot that he first had under consideration. From that lot we went across the town site again to the eastern portion of our land, just made a general trip over there and returned to town. [83]

Q. Did you take him to the Bolden and Olsen places—did he converse with the folks there, Mr. Bolden and Mr. Olsen? A. Yes, sir.

Q. During the time that you were there and called upon these people, did you afford him any opportunity for free conversation with him, or did you stick around all the time?

A. I certainly did. And, moreover, the next morning, which was Sunday, as I recall, I took Mr. Johnson back to Mr. Bolden's as he had been invited out by Mr. Bolden to spend the day with him. I took him out Sunday morning and left him there.

Cross-examination.

Q. You have taken hundreds of people out and shown them around the place there?

A. Yes, sir, that is my business.

Q. Do you remember with distinctness all these things that are said and the places visited each time?

A. I can remember certain things about everybody, and particularly cases like this where he knew some particular individual.

TESTIMONY OF E. E. AMBLAD, FOR DEFENDANT.

E. E. AMBLAD, a witness for defendant, testified:

Until a few months ago I was the Sales Manager for Sacramento Suburban Fruit Lands Company, located at our office in Minneapolis, and I was such during the time the Emil Johnson transaction was handled. I recall having certain conversations with Mr. Johnson. The first conversation was held at my office. His brother first brought him in. Mrs. Johnson was not present. We had several conversations, I cannot distinguish one from the others. I told him about the district in general, about the [84] raising of poultry out there, and told him about the poultry association, which he could join if he came out. It would cost him fifty dollars as a membership, but through this association he was able to buy his feed cheap and deliver his eggs to the association and they would market them for him. I told him about the poultry adviser who would consult with him from the beginning to help him get his poultry buildings started, and told him in general about the community. I told him about what the various people were doing. I had a large map in my office of the order of this one here, and went through the district, giving the names of the people who had formerly lived in Minneapolis. He asked in particular about a friend of his who lived out here, two friends, former neighbors in Minneapolis

(Testimony of E. E. Amblad.)

—Mr. Bolden and Mr. and Mrs. Olsen. In fact, he has some pictures of the Bolden family which were in our booklet, and he wanted to know about them. I told him about what they were doing; that he had started in the poultry business and was getting along very nicely. I also told Mr. Johnson and Mrs. Johnson about the way our people developed their places. Everybody, of course, had a family orchard in connection with their places, and our horticultural adviser would assist them in laying out their grounds when they arrived, advise them in regard to planting trees, orchards, and, in general, beautifying the place. I told them of course about the City of Sacramento and the general surroundings of the country they would live in, so they would have a general idea of where they were going.

As I recall it, his main intention in coming out here was to go into the poultry business. Mrs. Johnson's health was poor and they wanted to make a change of climate on that account, [85] and so Johnson, being a first-class carpenter, knew that he could get work here, and going into the poultry business, they knew they could get along, but poultry was the main idea of coming out here as far as the purchase of their land was concerned.

We had a conversation regarding the cost of installation of poultry-houses. I went into that thoroughly. We have a model in my office—a working model of the Lyding Poultry House, in which is installed all the labor saving devices, the nesting system, the lighting and ventilation, and the speci-

(Testimony of E. E. Amblad.)

fications for material and the cost. Mr. Johnson, being a carpenter, figured that out and went into the matter quite thoroughly.

Q. Was there anything said at the time of any of your conversations with Mr. Johnson, or at any time when Mrs. Johnson was present, regarding the commercial planting of fruit?

A. Yes, it came up about the time we got around to a deal. As they have testified, they offered some property in Minneapolis, a lot in the suburbs, as part payment, and on the deal that I proposed to them they were required to take ten acres. Mrs. Johnson, in particular, objected to taking ten acres. She only wanted five, but I told her the way we were operating we could not make a deal on the basis of five acres, on account of it being a trade deal.

Of course, where people buy for cash, they can pay any amount they want, but where they trade we are limited to the kind of a deal we can make. That is the only deal I could offer. She objected to that because she didn't know what they would do with the other part of the land. I suggested that they could either sell that land out, or go into some special kind of fruit, and she would have to be governed entirely after she reached Rio Linda as to what they should plant. I told them all about Mr. [86] McNaughton, that I was not competent to advise what would grow on that particular piece of ground; that they would have to depend upon what he told them after they arrived. I didn't

(Testimony of E. E. Amblad.)

know about the lot they finally selected, and did not at any time tell them that land was adapted to any particular kind of fruit. They made an exchange after they reached here.

There was very little said about an orchard, the cost of planting, or anything of that kind. I did not discuss with them the depth of soil of any particular lot, except I told them the soil throughout the district was fairly uniform, but of varying depths to hard-pan. I told them there was hard-pan under all this land.

I had nothing to do with their selection of Lot Thirty-five in Subdivision Five. That was done after they arrived here. I made no statements to them about Lot Thirty-five, and did not discuss with them the depth of soil or fruit-growing possibility of that lot.

Cross-examination.

I was sales manager back there all this time, where they were selling land to people in the Twin Cities, Minnesota, North Dakota, Wisconsin and Canada. I talked to Mr. Emil Johnson at my office and I was in his home half a dozen times at least, I presume. He came to the office once with his brother, and I did go to his house and talk to Mrs. Johnson. I am sure that one conversation was had at the office, and later, when the contract was signed, he came to finish with Mr. Crinkley.

Q. Didn't you tell him that this land out here was fruit land?

(Testimony of E. E. Amblad.)

A. We didn't talk about fruit lands.

Q. You talked to Mrs. Johnson about buying five acres more which might be put into fruit?

A. Yes. [87]

Q. And you say you have not talked about fruit lands?

A. I want to change that in this way, that I did not recommend that particular lot to any kind of fruit, but I did suggest that later on, if they wanted to go into that, they could discuss it with their horticultural adviser, that he would suggest some orchard that would be suitable and possibly grow all right.

Q. You told them that the tract generally was adapted to all kinds of fruit?

A. Not this particular tract, but the whole Rio Linda district.

TESTIMONY OF M. A. CRINKLEY, FOR DEFENDANT.

M. A. CRINKLEY, a witness for defendant, testified:

I am Secretary of the Company and have been connected with it since the summer of 1915. I was appointed Secretary in 1916. I met Mr. Johnson, the plaintiff in this case, in the negotiations leading up to his purchase. At the time Mr. Amblad and Johnson had come to the point where Johnson wanted to take in the lot and only purchase five acres, and they couldn't get anywhere

(Testimony of M. A. Crinkley.)

on it; they came in to see me. Mrs. Johnson was not there. Mr. Johnson told me at that time his idea was to go into poultry. He did not need any more land than five acres for poultry. I said, all right, if that is what's on your mind, forget your lot and we will sell you five acres. He didn't want to do that, he insisted on traking the lot. I said if you want to trade the lot you will have to take ten acres. We have to resell these properties and it doesn't pay us to bother with it. As I recall it, he went out and later came in and signed a contract and put his down payment on that very lot. That is all I had to do with it.

We bought this land in 1912, twelve thousand acres. That is a map of Rio Linda subdivided. The red dots on the map [88] indicate a site for building, for some family living there. The condition of the land at the time we bought it was altogether unimproved. They were raising grain on some of it.

We first began the sale of land in August, 1912. Mr. Terkelson is one of our first customers. The lands were first offered for sale in California. We had an office in San Francisco and in Los Angeles for many years, and since that time we have continuously had these lands on the market. They are on the market to-day.

At the time of this transaction in 1923, between two and three hundred families had located on the Rio Linda colony. Our best estimate to-day is

(Testimony of M. A. Crinkley.)

around five hundred families. We paid eighty-five dollars an acre for part of the land, and a hundred dollars an acre for another part, in 1911 and 1912. Since then the company has spent a lot of money for development and improvement on the land. We built the roads there and kept them up all the time development was going on, put in culverts, put in bridges over the creeks. There is a stretch of bottom land meandering through there. Laid out the town site, spent a lot of money getting power in there; advanced forty thousand dollars to the power company to get the power extended faster than the power company wanted to in order to relieve these people of buying gasoline pumping plants and have them resell them and buying electric plants, and generally stood behind the development of the district right from the start. Now we have a sixty thousand dollar schoolhouse, with busses to pick up the children and carry them in. We advance money to the people of Rio Linda, and when the Rio Linda Poultry Association was formed, built a warehouse for them; installed the machinery; subsequently sold the plant to the people at less than what it cost us, and they have done [89] remarkably well, much better than we have. Our operations don't show a dollar of profit.

Q. What does the land stand you to-day, considering the cost and the money expended for development and in the way of taxes?

A. Just figuring the initial cost of the land and the taxes, the road building and grading, we have

(Testimony of M. A. Crinkley.)

done there, it stands us without any interest over two hundred dollars an acre.

Q. When you say without any interest on your money, you mean the interest on what you paid for it, regardless of other money expended?

A. Yes, sir.

Q. Do these figures include selling cost, or any of those items? A. No, sir.

Cross-examination.

Q. You have circulated literature such as is exhibited here in evidence all through the middle west, all through the States of Iowa, North Dakota, Minnesota and so on?

A. Canada, California, Nebraska, Kansas.

Q. You say this land cost eighty-five and a hundred dollars an acre. As a matter of fact, wasn't that bought years before you were connected with the company?

A. I already testified it was bought in 1911, and I became identified with the company in 1915.

Q. You didn't have anything to do with the sale? You weren't there when they made the transaction?

A. I wasn't there when they purchased the land.

Q. All you know about it is what somebody tells you? A. Let me finish my answer.

Q. Of your own knowledge. [90]

A. Yes, I know all about it.

Q. How do you know?

A. Mr. McCutchen, I came out in the year 1916 and paid to the Sacramento Valley Development

(Testimony of M. A. Crinkley.)

Company several hundred thousand dollars in cash, and if a man doing that doesn't know about the transaction, I don't know—

Q. You don't know of your own knowledge what has been paid him?

A. If I don't, how would I know how much to pay him in 1916?

The COURT.—Don't argue.

The WITNESS.—Now, your Honor, it is not fair—

The COURT.—He is asking you if what you knew, you knew by hearsay.

A. No, sir, it is hardly hearsay.

The COURT.—No argument.

Mr. McCUTCHEN.—I move to strike his testimony as to what was paid for the land.

The COURT.—It will be stricken.

Mr. HUSTON.—Exception.

Mr. McCUTCHEN.—Q. Mr. Crinkley, you have been practically the general manager for this concern ever since you were secretary.

A. Never had that title.

Q. You have been the managing officer?

A. I am the secretary of the company.

Q. Were you on the witness-stand here in the case of Elm *versus* Sacramento Suburban Fruit Lands Company? A. Yes, sir.

Q. You remember the occasion of Judge St. Sure asking you some questions? A. Yes, sir.

Q. I will ask you if this question was asked you and this answer given by you at that time:

(Testimony of M. A. Crinkley.)

"Q. Is this land you are selling out good fruit land?

A. Yes, I would say it was good land if [91] handled right."

Were you asked that question and did you give that answer?

A. Yes, sir, and I would make the same answer to-day.

Q. (Reading:)

"Q. What do you mean by 'if handled right'?

A. There is fruit in every subdivision we have here."

A. Perfectly true.

A. (Reading:)

"Q. Would you call it fruit land?

A. Yes, I would call it fruit land.

Q. You can raise fruit upon that land in such quantities as to make it profitable?

A. No, sir, we don't sell it that way."

A. Yes, sir, I said that. Can I explain that?

Q. (Reading:)

"Q. Commercially?

A. No, we don't sell it that way. We don't talk about raising it commercially."

Q. Did you make that answer?

A. Yes, sir, and I would like to explain that.

Mr. McCUTCHEN.—That is all.

Redirect Examination.

Mr. HUSTON.—Q. You can explain it.

A. We had been talking about talks with the

(Testimony of M. A. Crinkley.)

people back east, and I wanted to make it clear to Judge St. Sure that in discussing deals one after the other, I must have talked to fifty per cent of the people; not one of them has discussed the commercial raising of fruit, or had any idea at that time of going into the commercial fruit business, and I wanted to make that clear to the Judge.

Q. What about the statements about the fruit not being profitable?

A. There was no market at that time.

Q. That is what you referred to? [92]

A. Yes, sir, it is not possible to make a commercial profit out of fruit at that time.

Mr. HUSTON.—Counsel made a motion to strike out all the testimony as to the cost of this land and your Honor granted it. Does that take—

The COURT.—As to the cost. That cost is really no test as to the value, anyway.

Mr. HUSTON.—We save an exception.

Recross-examination.

Mr. McCUTCHEN.—Q. Do you know of this conversation with Mrs. Johnson about selecting the additional five acres?

A. No, I don't think I ever met Mrs. Johnson.

TESTIMONY OF CARRIE KLAFFENBACH, FOR PLAINTIFF (IN REBUTTAL).

CARRIE KLAFFENBACH, a witness for plaintiff, in rebuttal testified:

I live in Rio Linda. I had a conversation with

(Testimony of Carrie Klaffenbach.)

Mr. Jarvis in front of our place about June, 1927, about my land. He had been out there possibly a half hour and I went out, asked him if he was going to make an examination of our ten-acre tract as to the fruit growing possibilities. He said, "No, I won't take the time, because I know you have no fruit land here. You can't raise fruit commercially on this hard-pan land."

Cross-examination.

I am a plaintiff in an action now pending in this court.

TESTIMONY OF JACOB M. JOHNSON, FOR PLAINTIFF (IN REBUTTAL).

JACOB M. JOHNSON, a witness for plaintiff, in rebuttal, testified:

I formerly lived in Rio Linda. Formerly owned some land out there. I know Mr. E. P. Verner. I had conversation with him [93] in September, 1921, about the Rio Linda lands. That was coming in from Fair Oaks. He said he felt sorry I bought land in Rio Linda at two hundred fifty dollars an acre; that he could sell me land a whole lot cheaper. He said I paid too much for the land.

Cross-examination.

I am also a plaintiff in an action pending in this court.

TESTIMONY OF EMIL JOHNSON, FOR PLAINTIFF (RECALLED IN REBUTTAL).

EMIL JOHNSON, plaintiff, recalled in rebuttal, testified:

I know Mr. Jarvis. I had a talk with him at my place in June, 1927. He made some borings or tests on the soil there. I asked him if he thought that was a commercial proposition for raising fruit. He said no. Then I asked him what kind of things he would recommend. He said, "I don't know."

Before the Court's charge to the jury, defendant requested the following instructions, among others:

DEFENDANT'S INSTRUCTION No. 1.

You are instructed that this is what is commonly known as an action of deceit. The gist of the action is fraud. Fraud necessary to support the action exists where a person makes a false representation of a material fact, susceptible of knowledge knowing it to be false, with the intention to deceive the person to whom it is made, and the latter, relying upon it, acting with reasonable prudence, is deceived and induced to do or refrain from doing something to his pecuniary loss or damage. In order to support an action of this kind, it is necessary for the [94] plaintiff to satisfy the jury by a preponderance of the evidence, (1) that the defendant made a substantial, material representation respecting the transaction; (2) that it was

false; (3) that when it made it it knew it was false; (4) that it made it with the intention of inducing the plaintiff to act upon it; (5) that the plaintiff was misled thereby, and in reliance thereon, did act upon it, and he thereupon suffered damage. If you should find that the plaintiff has failed to prove any one or all of these essential elements, your verdict should be for the defendant.

DEFENDANT'S INSTRUCTION No. 3.

You are further instructed upon the matter of plaintiff's discovery of the alleged fraud that if plaintiff discovered that a material representation concerning the land he bought was false, then he was at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring his action within three years of the discovery of the falsity of any material representation concerning the land.

DEFENDANT'S INSTRUCTION No. 4.

The essence of a cause of action for deceit consists in the fact that the false representations were made with intent to deceive, such intent being a necessary element to constitute actual fraud.

It must appear from a preponderance of the evidence that the false representations, if any, were made by defendant with a fraudulent intent, and for the purpose of inducing the plaintiff to act upon them. [95]

DEFENDANT'S INSTRUCTION No. 6.

You are instructed that plaintiff cannot recover in this action unless he was deceived by the alleged representations, for if the means of knowledge are at hand, equally available to all parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of those means and opportunities, he will not be heard to say that he has been deceived, unless he was induced by trick or misrepresentation of defendant not to make such inspection.

DEFENDANT'S INSTRUCTION No. 9.

The Court instructs the jury that if a misrepresentation is not material, a person has no right to act upon it, and if he does he is not entitled to relief or redress on the grounds of fraud; the question is not whether the person to whom the representation was made deems it material, but the question is whether it was in fact material, and if the defendant in this case made representations which were false, and which at the time they were made he knew to be false, and if you find that such representations were not material and that the plaintiff in this case had no right to act upon them, the plaintiff cannot recover.

DEFENDANT'S INSTRUCTION No. 17.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiff must show that the fraud occurred within three

years of the commencement of his action for relief, or if his action was commenced more than three [96] years after the fraud occurred, then he must show, in order to maintain his suit, that he did not discover he had been defrauded until a date within three years of the time he commenced his action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiff will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiff has proven by a preponderance of the evidence both that he did not discover the alleged fraud within the period of three years before he filed his action, and that he could not have discovered it by the exercise of reasonable diligence, three years before he commenced this suit. He was not permitted to remain inactive after the transaction was completed, but it was his duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to him. He is not excused from the making of such discovery even if the plaintiff in such action remains silent. A claim by the plaintiff of ignorance at one time of the alleged fraud and of knowledge at a time within three years of the commencement

of his action is not sufficient; a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do [97] so. If fraud occurred in this case it was complete when plaintiff contracted with defendant to buy land. Plaintiff commenced his action on 11th day of August, 1927; his contract with the defendant for the purchase of its land was made in February, 1923. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiff in the making of this contract, then before you can find a verdict in his favor, you must also believe from a preponderance of the evidence that he neither knew of the fraud nor could with reasonable diligence have discovered the fraud before a date three years prior to the commencement of his action, that is, before the 11th day of August, 1924. If you believe from a preponderance of the evidence that plaintiff either knew of the facts constituting the alleged fraud before August 11th, 1924, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant.

CHARGE TO THE JURY.

The COURT.—Gentlemen of the Jury, you have heard the evidence and the argument, and now it

is for the Court to deliver to you the instructions, and that means that the Court is to instruct you in the law that applies to this case, and in the light of which, in so far as the evidence is in conflict, you will determine the facts. Remember, you take the law from the Court, and the Court, and all of us, take the findings of fact from you.

The charge in this case is that the plaintiff, Emil Johnson, in 1923, purchased certain lands from the defendant, the land being located in this county, in the Rio Linda subdivision, colony or district, and the plaintiff alleges that he was induced [98] to buy that land by reason of certain false representations made to him by the defendant, amongst others that the land was worth $400 an acre, he buying ten acres of the land for $4,000, and that it was perfectly adapted to the raising of all kinds of fruits. There are other representations which plaintiff alleges, but these two are the two, if the proof sustains any, or sustains one of them, it is sufficient for plaintiff to rest on at this time.

The defendant denies that it made any such representations, denies that it represented the land worth $400 an acre, and denies that it represented the land was perfectly adapted to the raising of all kinds of fruits, that fruit-trees of all kinds would thrive and flourish thereon and produce an abundance of fruit.

The burden of proof is upon the plaintiff to prove substantially these allegations, or enough of them to make out his case before he can recover, and he must prove that by the greater weight of the evi-

dence, and of course when you ask yourself whether the plaintiff has proven these allegations by the greater weight of the evidence, you do not look at his evidence alone, but take into consideration all the evidence. If there is anything in the defendant's evidence that makes in behalf of plaintiff, he is entitled to the benefit of it, the same as if there is anything in plaintiff's evidence that makes in behalf of defendant, the defendant is entitled to the benefit of it. And after you have weighed and considered all the evidence in the case, then you determine whether the greater weight of it on these issues is with the plaintiff, and if it is, he is entitled to a verdict accordingly.

You may conceive, if you like, all that makes on behalf of plaintiff on one side of a scale, and all that makes in behalf of defendant in another side of the scale, and unless plaintiff's outweighs—if they remain in equipoise or the defendant's is the [99] heavier—unless plaintiff outweighs defendant, he has failed to prove his case, and defendant is entitled to a verdict.

No matter how good a cause of action any man may have, when he comes into court before a jury, he must be able to prove it by evidence. When the case is concluded, so far as the evidence is concerned, the greater weight of it must be with him, the plaintiff, or his good cause of action avails him nothing, and the opposing party is entitled to the verdict at your hands.

When it comes to determining the greater weight of the evidence, that involves, of course, the credi-

bility of the witnesses, your confidence in their ability to know and to remember, and in their honesty and accuracy in reporting the facts to you. You observe the witnesses, their demeanor, take note of their interest in the case—there is interest in the case in behalf of both parties here. Plaintiff of course is interested. The defendant's agents and officers of course are interested, and witnesses may display more or less partisanship in favor of a party, and you always ask yourselves if that interest or partisanship, if you see it, have influenced the witness so that his testimony is not fully to be relied upon or perhaps not at all, which is entirely for your determination. You take note of the reasonableness of a witness' statements to you, and the probability of them, because reasonableness and probability is a great test of truth.

The plaintiff is not obliged to prove his case to an absolute certainty, because that kind of proof is not possible in any case at all in a court of law. To prove a case beyond some degree of probability—even in a criminal case it is only a very high degree of probability. In this case the only proof required of the plaintiff is proof of an allegation beyond a [100] reasonable doubt. The burden of proof is with him. It is the evidence that you credit that counts in a case. The witness whom you believe—you are not obliged to believe a thing is so simply because some witness testifies it is so. Of course you can see that is only common sense, as well as law. If you were obliged to believe a thing because a witness testified it is true, when

two witnesses testifying to a particular thing each give testimony directly contradicting the other, you would be in a bad predicament. You would be compelled to believe both. No. You test a witness by all those tests which serve to determine whether a man is telling the truth, the same as you would in your daily life. I imagine all of you in such event would be capable of understanding whether you are being dealt with truthfully and honestly, to defeat the attempt of anyone to put anything over on you, and the way you determine the truthfulness of the men you deal with in daily life, you determine the truthfulness of witnesses on the witness-stand.

There is a maxim in law that if a witness testify falsely in any one particular, he may swear falsely in all, and you ought to distrust all the testimony of that witness, and if your judgment approves you may reject it all, because if his oath has not held him faithful to truth in one instance, how can you have any confidence that it would hold him faithful to truth in other instances. A man who takes a solemn oath to testify the truth, the whole truth, and nothing but the truth, if he violates it in one particular, he may well do that in others.

That will be material, because there has been an attempt on both sides to impeach witnesses, that is to say, to show that the witnesses have not testified truly on the witness-stand in some particular, and we will come to that later. If you find or this develops in respect to what any witness on either side has [101] said, then the maxim or rule of law

which I have stated to you will be applied by you.

Now, Gentlemen of the Jury, the parties have asked a great many instructions, that is to say, technical, abstract rules of law, to be given to you by the Court. I think that it will not be necessary to thus deal with the law. We will proceed to the case, and the Court will state the law in ordinary language as applied to the facts of the case, and I believe you will understand it better. That is the only object of the Court in delivering instructions and enlarging upon the law, is to reach the understanding of the jury so that it will know, and in the light of which, it will determine the facts.

Coming then to the case. In the first place, the plaintiff must prove by the greater weight of the evidence that these representations were made to him by the defendant's agents or officers. Of course the defendant, a corporation, can act only by agents or officers, and its agents or official representatives the defendant employs and is responsible for, just the same as *on* any one of you, if you send an agent out to do your business, whatever he represents in your behalf, you are responsible for, and take the consequences if it is untrue.

So coming to the representation that the land was worth $400 an acre. The plaintiff testifies that both Schei and Amblad told him that the lands in the Rio Linda district were worth $450 and $400 an acre, and though Schei and Amblad have both testified for the defendant, neither of them deny that they had made that statement to the plaintiff, so you see it can be well taken as true, unless you be-

lieve that plaintiff is not worthy of credit in that particular, at all, or in that particular. So that is how the evidence stands in respect to the representation that the land [102] was worth $400 an acre.

Therefore, coming to the other representation which I think I require particularly to point out to you, that the land was well adapted, perfectly adapted to the growing of fruits. Has the plaintiff proven that substantially?

Take this book which the defendant circulated in order to induce customers of course, and we find that statement in substance has been made in the book, and furthermore the plaintiff testified that Amblad told him the same thing, and Amblad admitted it to all intents and purposes when upon the witness-stand. Amblad says he did tell the plaintiff that—I don't remember in just what order these witnesses testified—yes, he says: "I did tell him that the district generally was adapted to all kinds of fruit, though I didn't tell him this particular piece or any particular piece was adapted to any particular kind of fruit. Told him the soil was all alike in the district." And you come to the book, and we find the same statement made. For instance, this page 6 of the book, in what purports to be a letter from the Horticultural Commissioner, it says: "The splendid growth and the excessive yield obtained during the past five or six years has proven beyond a doubt that this district is well adapted for the commercial growing of almonds, pears, peaches, olives, cherries, grapes, plums, figs

and berries," and the like; the deciduous fruits is what this plaintiff claims this land was represented to him as valuable for, and that it is not.

Now, there is no evidence that this letter was written by the Horticultural Commissioner, and it doesn't make any difference, for whatever the defendant puts out as the statement of others, it is its own statement and is responsible for the statement thus made, because it prints it and presents it to the customer. [103]

Going to page 9 of this book, we find the statement that the land is well adapted to the successful growing of peaches and the like, and then it says he ought to arrange for the planting of the family orchard first, and then put the rest of his acreage in some particular kind, after consultation with the horticultural department, and the kind preferred by the customer. It doesn't say that the land will only grow a particular kind—you remember that these representations are to be reasonably interpreted, as you believe a customer would understand them. If the defendant uses ambiguous language in his literature, in the statements it makes, they are bound by it, when they are representing things as facts.

Then again, on page 10 of the pamphlet, it says: "The orchard trees may be expected to produce the second and third years, and commercially from the fifth to the sixth years." You see, the company was representing that this land was well adapted to the commercially raising of these deciduous fruits. From the fifth to the sixth year—fifth to

the seventh year, and there would be time allowed to a customer to settle or to test out by practical experience whether that representation was made good, "would come into commercial bearing in five or six years."

So, Gentlemen of the Jury, the only interpretation that can be placed upon the representation made by the defendant in its book and by its agent is that it did represent that the land was well adapted for the successful raising of the deciduous fruits commercially, and that substantially proves the representation which the plaintiff in his complaint alleges was made to him, and on the strength of which he says he bought the land.

Taking that as proven, then, Gentlemen of the Jury, you will proceed to the next step. Was the representation believed by the plaintiff? Well, he says he believed it. Ask yourself, "Isn't [104] it probable that he believed it?" He was a Minnesota man. This was made known to him in the depth of winter, when California would be very attractive to people down there. He doubtless wanted to believe it. That's all right. He is not at fault. He has a right to believe he is dealing with honest men, or with men that would not misrepresent, and if these representations were made to him, he had a right to believe and rely on them, as he says he did. And is not that the reasonable and probable likelihood that he did, because he had never seen the land? He was dealing with experts. The defendant holds itself out as supplied with experts, orchardists and the like, who know what

they are talking about. So did he believe it? The law says it ought to be inferred in such circumstances that he did believe it, and I think you can take it that he did believe it.

Did it contribute to inducing him to buy the land? Of course, if he would have bought this land regardless of these representations that the land was worth so much money, and that it was well adapted for commercial orchard, if he would have bought anyhow, then these representations did not influence him and did not damage him, because that is the law. If he had bought the land regardless of these representations, not induced by them to buy, then his case falls. Was he induced by them? Remember, the representations were made to induce him to buy, to influence him, were they not? That's the object of this circular, and the object of the company's agents' statements to him, to influence and induce him to buy, and it is the reasonable and the only reasonable inference, it seems to me, that it did influence him to buy.

It is now time to talk about poultry. The books tell him he ought to raise poultry the first thing, to get an immediate income until such time as he is able to embark in fruit. The first [105] time that the orchard will bear commercially, the book says, is the fifth to the seventh year. Moreover, the plaintiff testified—and his wife—that they only wanted five acres, but defendant's agents, including Crinkley, insisted they should take ten, that the other five could be especially devoted to fruit for commercial orchard. The plaintiff testified to

that, and there is no denial on the part of defendant that that representation was made to him. Indeed, Crinkley says that he insisted that he should take ten acres because of his trade they were making, and Amblad didn't deny that, as I remember it.

If the Court's memory is at fault, and you remember the testimony otherwise, Gentlemen of the Jury, it is your memory finally that controls, and if any time there is a doubt in your own minds, you have the right to call for the record and have it read over.

So taking it, if you do, that plaintiff was induced to buy by these representations—remember that the representation need not be the sole inducement. If it was represented to him as having many inducements, he had a right to be influenced by them all. The experts of the defendant said that all of these advantages attached value to the land. These representations were material expressions of fact. As a matter of law, the Court will tell you that, stated under the circumstances that they were—the land was told to him to be valuable for poultry, for fruit, valuable by reason of its contiguity to your city here, and the experts' advice that he would receive while there cultivating the land, he had a right to all these things which were told him the land was desirable for. Even if he didn't desire to go immediately into the commercial orchard, it attached value to the land in the judgment of any man. If you are buying a piece of land, you are [106] glad it is valuable for as many different

things as possible, for the more readily you will find a market for it some time. More likely to have a success with the land as a whole, because if you fail with one thing, you will succeed with another. So with this plaintiff.

So if you find that these representations of value and adaptation to commercial orchards were an inducement to plaintiff, and influenced him to buy, then you proceed to the next step, which is: Did the defendant know the falsity of the representations, if they were false, which we will come to later? In these books they represented that it was already proven that the land was adapted to the commercial raising of fruit. There they state it as a fact. If it was not, it ought to be inferred that they knew, because they had every opportunity to know. The land was there. Moreover, if they didn't know it was false, all under the circumstances, considering their relation to the land and their opportunities and their general knowledge, if they ought to have known, it is the same thing as if they did know, because no one inducing another to enter into a bargain can make a positive assertion of fact contrary to the truth if they are culpably negligent in not knowing the truth, and *and* I think you will agree the defendant was in this particular case. That is for your judgment, moulding it by what you would know or ought to know in like circumstances if you were in the position of a company thus handling and dealing with lands over a period of ten years.

That decided against the company, if you do, Gentlemen of the Jury, namely, that they knew it

was false, or ought to have known, these representations, if they were false, then comes the next step. Were these representations false, untrue? That is the big issue in the case. Were the lands worth $400 an acre? You [107] have the evidence on both sides in respect to that, and the circumstances, which will enable you to form a judgment of your own as reasonable men of some knowledge of affairs, beyond question, businessmen or workingmen, whichever you are. Take into consideration everything that made for the value of the land in 1923. That's the test, when the bargain was made, February, 1923. Take into the case the representations made, as he says and which was not denied, in the testimony or evidence, that it was worth $400 an acre. Was it? The expert for the plaintiff, Kerr, introduced by him, testified that those lands were worth $50 and $75 an acre, $50 to $75 an acre, and he gives you what he takes into account. He takes into account everything that makes for value in the way of a home; he says for raising poultry, nearness to Sacramento, transportation, light, power, and the like, settling up of the community, the advices that he might get from the experts. And you must remember in that connection that the company didn't bind itself to give any expert advice, though it promised it, and so far as it appears it has so far rendered it. As long as it has lots to sell, of course it would stand it in hand to continue that advice, but it never bound itself to continue for a day set, expert advice.

But Kerr says he takes all that into considera-

tion, and that the land is not worth, in his judgment, over $50 or $75.

Then plaintiff's own testimony is that the fruit-trees, because of the shallowness of the soil, after a short period of time died off, and the testimony of his expert, Mr. Davis, is the land is not successfully adapted to raising fruit, for shallow soil, and hence, if not successfully adapted to raise fruit, commercially, where is the $400 value? [108]

The defendant introduced two experts, Verner and Traxler. Mr. Verner says it is worth $400 or $375, perhaps—I am not certain—yes, Mr. Verner says the land at that time was worth $375 an acre, and he takes into consideration all these matters of location, railroads, electric power, high land, not subject to flood, roads, and the like, and he is asked, and this is one of the places where plaintiff attempted to impeach the witness first, Verner is asked if he didn't tell Johnson, who owns land in that Rio Linda district, that if he paid $250 for his land he paid too much. Verner says he didn't. Johnson came on the witness-stand and says he did. If you believe Johnson instead of Verner, then remember that maxim of the law about a witness who testifies falsely in one particular will be distrusted in others, and you can reject it all, if you see fit.

Moreover, if Verner has told Johnson that $250 an acre was too much, what is his testimony that it was worth $375 an acre worth at this time? Inconsistent statements, Gentlemen of the Jury, may be taken into account in determining the value of a

witness' statements upon the stand. If upon the outside he states the land is too high at $250 an acre, then when he comes in to testify for the defendant and says under oath that it is worth $375 an acre, it is for you to determine how much credit you will give to his opinion as to the value at this time of $375 an acre. It is a matter for the judgment of the jury.

Then the other expert in behalf of defendant, Mr. Traxler, had had lands out in that same locality, a little nearer the city, and his judgment and opinion, as he expresses it to you, is that the land was worth $400 an acre at that time, in 1923, and he tells [109] you why, what the land will produce, and the location, and defendant's experts' advice, and transportation and the like.

You see, Mr. Traxler includes in his value of the land the fact that the customer or purchaser, the plaintiff, will get expert advice from defendant, and on cross-examination he was asked about that, and he says that he puts the value of this expert advice as just about almost as much as the land is worth. If that could be adopted, then Traxler considers the land, without the advice, as something over $200 an acre, and the balance of his $400 is made up of the experts' advice. That is a reasonable interpretation to put upon his language. That is what he said, and it is for you to say. Remember, an expert's advice, so far as property, has an element of value, but was it worth nearly as much as the land, and do you consider that Traxler said it

was worth $200 at that time, or was the balance, as he said it, made up of the experts' advice.

Now, the defendant has introduced quite a number of witnesses to show what they claim is the productiveness of the land adjacent thereto, and it is agreed that all these lands in Rio Linda are about the same. The defendant maintains and insists that plaintiff's land is worth about the same, and hence it was worth $400 an acre.

You must remember this, Gentlemen of the Jury. In dealing with experts' testimony on both sides, or any other witness in respect to opinion on values, you are not bound by an expert's opinion. That is to say, you are not bound to accept it if you do not have confidence in it or give credit to it. An expert is like any other witness, but he is assumed to have special knowledge [110] by reason of dealing in that kind of land, these expert realtors, and he is assumed thus to better know the value. You give respect to any man's learning, as far as appears, and then take into account your confidence in his ability to know and honestly report to you, if you have any such, and then determine for yourself what is the value of the land. It is for you to say how much this land is worth.

If you find it was worth $400 an acre at the time plaintiff bought it, he is out of court, because no matter what was represented to him, he hasn't been damaged. A man is not entitled to maintain such a suit unless he has been damaged, and his damage is the difference beween what he paid and what he secured. So when he paid $400, if he got land

worth $400 an acre, then he hasn't been damaged, and he must go out of court.

If you should determine, however, that the land was worth less than what he paid for it, $400 an acre, then you proceed to determine the question whether the land was, as represented, adapted to the successful commercial orcharding enterprise.

In respect to that, the plaintiff tells you how he made an endeavor to raise trees. He has given them the best of care, irrigated, cultivated, sprayed, and the like, but after a year or two they began to die. Of 65 trees he planted in '24, one had died in 1925, two in 1926, fourteen in 1927, and two more in 1928, making a total of some nineteen trees out of sixty-five having died. Some were replantings, I think he said.

He also presented to you the testimony of Mr. Davis, agricultural specialist, who tells you that he has examined this land, that the soil is what he terms to be shallow, that it averages only about 24 inches in depth, and that includes four or five inches of clay on the bottom, and then he says you come to [111] hard-pan, samples of which he put in evidence before you, and that that hard-pan is exposed in the well pit twelve or thirteen feet, and not hit bottom. Mr. Davis tells you that that land, from his experience as a practical orchardist, is not adapted to commercial orcharding, because the soil is too shallow, and doesn't accord the necessary opportunity for the roots of growing trees to feed over a series of years that an orchard ought to live in order to be commercial. It doesn't afford suffi-

cient anchorage for the roots or sufficient conservation of the moisture, and sufficient area to hold the moisture, and the hard-pan prevents the roots from going down below that average of 24 inches that he tells you.

He tells you this hard-pan, if you try to blast it, since it is too thick to blast through with any reasonable effort, and that's all anyone is required to make, would form what he terms a pot hole, too deep to blow it through, and this would collect the rains, the moisture, affect the drainage, wouldn't allow the moisture to drain off if there was a surplus, and affect the roots of the trees and kill them. He further tells you he has raised fruit on this shallow land, and found it not successful.

He further tells you that a successful commercial orchard comes into bearing in four to ten years, and the defendant says five to seven years. Of course there is expense attached, which creates an overhead, and requires, in order to be successful, that the orchard shall live and bear a sufficient period in the future to balance not only the cost for that time, but the preliminary cost of bringing it to that point, and he says the trees won't live long enough on that shallow land to do that. He says something about a tree, where the soil would be only one [112] foot, dying in one year, two feet in two years, something like that.

On the other hand, the defendant introduces many witnesses who have not grown commercially in Rio Linda, but separate trees. They tell you the trees do well, bear well, fruit of good quaility, and

in quantity, and it introduces at least one, Traxler, who speaks of having a commercial orchard upon this land of some number of acres. Mr. Traxler testified that he had—not Traxler, either, that I had in mind for the moment. Turkleson. Mr. Turkleson has lived on this land fifteen years. He has 40 acres. He tells you the soil is three to eight feet deep on his land. On the plaintiff's it only averages 24 inches. That he has three acres of pears that are thirteen year old. He doesn't tell you whether it is on the three-foot depth or the eight-foot depth. It might well be on the eight-foot depth. Testifying as an owner of a commercial orchard, Mr. Davis says five feet is sufficient for a commercial orchard, and you cannot guess that Mr. Turkleson's orchard is on the shallow soil, because when a man puts a witness on the stand he must make the truth known, the fact known, and not let you guess at it. A guess that it was on the three-foot depth wouldn't be a bit better than that it was on the eight-foot depth. If on the eight-foot, it detracts largely from Mr. Turkleson's testimony, of course, because his soil is no such depth as that of the plaintiff.

This three-acre pear orchard, according to Turkleson's statement, has done very well, produced fifteen to twenty tons one year. Last year was a failure. Generally a good crop. And on the strength of that he says it was good fruit land. But, as I said, the value of Turkleson's testimony for the defendant rests [113] on the fact that it was on shallow soil, and there is no evidence that it was, and you cannot guess that it was.

Other evidence is that of Twining, the chemist, who examined the land. He says the hard-pan is under the surface eight to forty inches, two spots eight inches. It averaged 24 to 30 inches, about the same as Davis said. In other words, Twining says from eighty to forty inches down to hard-pan. He produces a sample of hard-pan, which he said is a thin shell, easily broken by blasting, and the rest is soft enough to disintegrate when exposed to atmosphere and water, and itself furnish the food elements. But you remember Davis' testimony that the well pit showed 12 to 13 feet in depth and hasn't disintegrated. Standing as it would ordinarily in the well pit, it certainly would be exposed to atmosphere, if not also to the moisture, and no one has said that that well pit doesn't stand solid as originally sunk, as Davis said it did, no one for the defendant.

Mr. Twining also says, properly prepared this land will produce commercial orchards, allow fruit to be raised commercially, and he means by "properly prepared" blasting, cultivating, and so on, and blasting will cost some thirty dollars an acre. He says he thinks it can be blasted through for thirty dollars an acre, so the land will raise fruit in commercial quantities. He says there is no arbitrary standard that five feet is essential. Mr. Davis didn't say that was an arbitrary standard, that to his experience and judgment that it takes land that deep to give long life, sufficient to render it successful for commercial orchards.

The defendant also introduced Mr. Morley, who

examined this and other lands. He tells you of certain lands that they examined, where the land was doing well, and which he believes are [114] commercial orchards, though he doesn't know of his own knowledge, and that he saw good fruit crops, good in size, good in quality and in amount, and, properly blasted, this land of the plaintiffs ought to be fit for commercial orchards. So does Jarvis, the horticulturist, who testifies to how many commercial trees, as he calls it, upon this Rio Linda project, about 53,000, and properly prepared it is adapted to the commercial growing of fruit. Says that five feet is better adapted, but this is still adapted at the depth they found.

Then further effort is made by plaintiff to impeach Mr. Jarvis, and he is asked if a year ago he didn't examine this land and go on Mrs. Klaffenbach's land, who has land in this colony, and if he didn't tell her—this land is all assumed to be of like character—that he wouldn't test her land, that it wasn't any use, only twenty-four inches of soil, that it wasn't adapted for the commercial growing of fruit. Jarvis says he didn't say that. She goes on the stand and testified that he did. Jarvis is also asked if he didn't tell this plaintiff that his lands were not adapted to the commercial growing of fruit. Mr. Jarvis says he didn't say that. The plaintiff takes the stand and says he did.

There puts to you again the question of credibility of these witnesses. Do you believe Jarvis or do you believe Mrs. Klaffenbach and the plaintiff? Because if Jarvis made those statements and denies them now, he denies them either wilfully or through

forgetfulness, either of which would bring in play the maxim that I mentioned, false in one would cause you to distrust all his testimony, and reject it if you see fit. Moreover, a year ago when he was not a witness in the case, if he told these people that these lands were shallow, 24 inches deep, and the property was not adapted to commercial orchards, ask yourself how much [115] credit you give his word now that it is adapted to commercial orchards.

The Court cannot decide that for you. It cannot undertake to do so. Sometimes the Court may express its opinion, but it does not do so with the hope or expectation to bind you to its opinion, but with the hope that it may help you to reason out the case to a successful conclusion. So between these witnesses you must remember the other two witnesses are interested in the case. The plaintiff has a large interest in the case, the same as defendant, and the Johnson who testified for him, or Mr. Klaffenbach who testified for the plaintiff also has a suit against the defendant.

Other witnesses express their opinion that the land is adapted to commercial orchards, among them Traxler, who testified to certain knowledge that he has, including something was told him. I think what was told him by others was stricken out. He claims to know and testifies that he knows that out in that section, where there is a little difference in soil, and the same hard-pan beneath, that the lands will raise fruits in commercial quantities. He tells of a certain orchard, Stout, eleven acres that he blasted and raised peaches, plums, and

'cots, as fine an orchard as you will find anywhere in the country, six tons to the acre, that he sold at $80 a ton.

Whether land is successfully adapted to the commercial growing of fruits of course cannot depend upon marketing altogether. It implies, or would involve land that with reasonable care and diligence would raise a crop in honest quality and quantity, reasonably sufficient at reasonable prices to make a profit. If for some sudden fluctuation in the market fruit becomes worth nothing, that wouldn't deprive land of its adaptability for commercial orchards. On the other hand, because of a sudden [116] fluctuation, fruit would go up to a higher price, the fact that some land, not otherwise adapted to the growing of fruit, produced a small crop that sold at a good profit, that wouldn't necessarily make the land adaptable for the commercial growing of fruit. It is a matter for considered judgment and average knowledge of men in the jury-box.

So now, Gentlemen of the Jury, has the plaintiff proved that the land is not adapted to commercial orchards? On taking the whole evidence, is the greater weight of it with plaintiff, that the land is not adapted to commercial orchards? If it is, he has proven his case, and is entitled to your verdict, and if he has not proven that by the greater weight of the evidence, he has failed to prove his case, and the defendant is entitled to your verdict. There would be no false representation to that, and unless you find the value was misrepresented, as I

able person would find, by such reasonable diligence as in your judgment he ought to have exercised at the time. But remember that the representation that the land was fitted for commercial orchards was a matter not obvious by merely looking at it. That was a matter for experts, because you see how the experts disagree even in this case to-day, and the mere fact that one might know and discover there was hard-pan a few feet below the surface would not be enough to impress the average man, a man of the intelligence of the plaintiff. You take into account who the plaintiff was. He wasn't a farmer, an easterner, and you measure his diligence in discovering the truth by all the circumstances in the case. He discovered this hard-pan some time in 1923 when he dug his well pit, but if he had any suspicion, if that was enough to put him on notice, he says he was disarmed from diligence by the statement to him of McNaughton. "Why, that hard-pan is not an injury. It is a benefit. It will furnish fertilization for the trees." The defendant answers that, "Take this hard-pan, break it up, and it is as good as the top soil, and it will keep down the moisture." That is to say, I mean it would keep the moisture in the ground. Undoubtedly it will hold water as it stands. It prevents seepage of moisture. The experts all agree that—both the experts for plaintiff and the experts for defendant say it must be broken, while the plaintiff says it can't [119] be broken through and allow the moisture to seep off. Was he told by McNaughton in 1923 that the hard-pan was a benefit, and rea-

sons given? Would not that excuse him from further investigation? If investigation on his part would have been likely to have discovered the truth? That is for your judgment. Consider yourself in his place, his knowledge or lack of knowledge, his previous occupation and all that he has read, first in this circular of defendant, and what defendant had told him. Take that into account.

Moreover, he is told by the circular that to bring an orchard to bearing takes five to seven years. He has a right to test it out. He wouldn't be obliged to grasp and believe anybody's statement if he heard it, that it was not adapted to commercial orchards, and he would have five to seven years, according to defendant's theory, to test it out, if he didn't otherwise find out it was not adapted to commercial orchards. He says he planted his trees in 1924, and seeing them die, as they did, mostly in 1927, his theory is that it was then when he discovered, and only then, that the land was not adapted to the commercial growing of fruit.

As I said, if he did not discover the fact, and there was no culpable negligence for not discovering it up to August 11, 1924, his suit is in time.

Now, put yourself in his place and consider all the evidence when you decide that.

There was an attempt to impeach the plaintiff which I overlooked, and I must tell you about it now. That is, the plaintiff was asked if he hadn't written to people on the project before he came out, for information in regard to the land, and he said that he hadn't, but his wife wrote to somebody and

didn't get any answer. The defendant put Bolden on the stand, who says he [120] received a letter from plaintiff, and answered it, and when plaintiff came out he admitted he received it. The same rule would apply, the maxim. If you believe Bolden instead of plaintiff, that the plaintiff did write the letter, whether the plaintiff destroyed it, and the plaintiff admitted receiving the answer when he got out here, then you have the right to distrust his testimony. But remember, if the plaintiff falsified in respect to that, it does not do away with the practical admission of defendant that the representations were made, and you can test out the question on other theories.

That concludes the instructions. When you retire to the jury-room you will select one of your number as foreman. It takes twelve to agree upon any verdict. Any exceptions for plaintiff?

Mr. McCUTCHEN.—None.

The COURT.—Any exceptions for defendant?

Mr. BUTLER.—Except to the Court's instructions on the question of representations claimed to have been made. First as to value; second as to the question of perfect adaptation for raising all kinds of fruit; third as to the raising commercially. Except to the Court's instructions on the question of belief of plaintiff in the representations as an inducement and the representations having been made to induce him to buy. Also upon the knowledge of falsity of the representations, and the neglect of the Court to instruct on the question of intent. Next on the question of the falsity of the representations both as to value, adaptability to

fruit, and the commercial raising of fruit. Next upon the question of productivity. Except to the Court's instructions on the question of the statute of limitations, and the refusal of the Court to give instructions on the statute of limitations as proposed by defendant. [121]

The COURT.—I think, Gentlemen of the Jury, the Court will refer to this matter of intent. I overlooked that, perhaps, or didn't think it was necessary.

The defendant must have intended that its representations should have been relied upon. It is for you to say whether the defendant did intend. What did it issue the circular for, making these representations, and what did its agents make them for, except with the intent that the plaintiff would believe and rely upon them? That's only common sense, as well as law, and that is all the intent that is necessary to make the representations fraudulent, and the defendant guilty of fraud, if they are proven. Any further exceptions?

Mr. BUTLER.—None.

(The jury then retired to deliberate upon its verdict.)

Defendant proposes the foregoing as its bill of exceptions on appeal from the judgment in said cause, and prays that it be allowed and settled as such.

BUTLER, VAN DYKE & DESMOND,
ARTHUR C. HUSTON,
Attorneys for Defendant and Appellant.

Dated: October 24, 1928. [122]

[Title of Court and Cause.]

STIPULATION FOR SETTLEMENT OF BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correct and may be signed and settled as such upon appeal.

Dated: November 17th, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiff.
ARTHUR C. HUSTON,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions do not appear in the record of said cause, I, A. F. St. Sure, Judge of the District Court, upon the stipulation of the parties, have settled and signed the said bill, and have ordered that the same be made a part of the record of the said cause, this 21st day of November, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Nov. 23, 1928. [123]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND COST BOND.

On the filing by defendant of a petition for appeal, with assignment of errors, and on motion of defendant, by its attorneys, IT IS HEREBY ORDERED:

That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered herein be, and the same is hereby, allowed.

AND IT IS FURTHER ORDERED that upon the giving by defendant of a good and sufficient bond in the sum of Three Thousand Seven Hundred ($3,700.00) Dollars, and conditioned as required by law, and the rules of this Court, all further proceedings in the said court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals or by the Supreme Court of the United States upon a petition for writ of certiorari.

IT IS FURTHER ORDERED that the amount of cost bond on said appeal be, and it hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned as required by law and the rules of this Court.

The supersedeas and cost bond may be embraced in one document.

Dated: October 25th, 1928.

BOURQUIN,
United States District Judge. [124]

Service hereof is hereby admitted and receipt of copy acknowledged this 25th day of October, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
OTIS D. BABCOCK,
Attorneys for Pltf.

[Endorsed]: Filed Oct. 25, 1928. [125]

[Title of Court and Cause.]

SUPERSEDEAS BOND AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Sacramento Suburban Fruit Lands Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, and authorized under the laws of the State of California and the above-entitled District, to act as sole surety on undertakings of this character, as surety, are held and firmly bound unto Emil Johnson, the above-entitled plaintiff, in the full and just sum of Three Thousand Nine Hundred Fifty ($3,950.00) Dollars, to be paid to the said Emil Johnson, his attorneys, executors, administrators or assigns; to which payment, well and truly

to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of October, 1928.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Northern Division, Second [126] Division thereof, in a suit pending in said court between said Emil Johnson, as plaintiff, and Sacramento Suburban Fruit Lands Company, as defendant, a judgment was rendered against the said Sacramento Suburban Fruit Lands Company in the sum of One Thousand Eight Hundred Fifty ($1,850.00) Dollars, and in the further sum of costs amounting to $30.85, and the defendant having been allowed an appeal from the judgment to the United States Circuit Court of Appeals for the Ninth Circuit; and the Court having made an order for supersedeas, staying all proceedings in the District Court pending final determination of said appeal, provided the defendant give a bond in the sum of Three Thousand Seven Hundred ($3,700.00) Dollars, conditioned according to law; and the Court having fixed the amount of cost bond on said appeal in the sum of Two Hundred Fifty ($250.00) Dollars; and the Court having ordered that the supersedeas bond and bond for costs might be combined and embraced in one document,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Sacramento Suburban Fruit Lands Company shall prosecute its said appeal to effect, and answer all damages and costs

if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

AND IT IS FURTHER EXPRESSLY AGREED by said surety that in case of a breach of any condition hereof, the above-entitled court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the action in which this bond is given to ascertain the amount which said surety is bound to pay on account of such breach, and to render judgment therefor against it and to award execution therefor.

IN WITNESS WHEREOF, said principal and surety have [127] executed this undertaking, attesting such execution by their respective seals, all on this, the 25th day of October, 1928.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation.

[Seal] By A. E. WEST.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation.

[Seal] By J. W. S. BUTLER,
Attorney-in-fact.

State of California,
County of Sacramento,—ss.

On this 25th day of October, 1928, before me, a notary public in and for the county of Sacramento, State of California, personally appeared J. W. S. Butler, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Standard Accident Insurance Company, and he acknowledged to me that he subscribed

the name of Standard Accident Insurance Company thereto as principal and his own name as the attorney-in-fact.

[Seal] GERALD M. DESMOND,
Notary Public in and for the County of Sacramento, State of California.

Form of bond and sufficiency of sureties approved:
Dated: ——————————.

——————————,
Judge.

Aprvd.

BOURQUIN, J.

[Endorsed]: Filed Oct. 25, 1928. [128]

[Title of Court and Cause.]

ORDER TRANSMITTING EXHIBITS.

It appearing to the Court that the exhibits of plaintiff and defendant, except the perishable exhibits and samples of hard-pan should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit in their original form.—

IT IS HEREBY ORDERED that said exhibits, except the perishable exhibits and samples of hard-pan, be transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit in original form, with the bill of exceptions, and need not be printed as part of the record herein.

Dated: Jan. 14th, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 14, 1929. [129]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare a record on appeal containing true copies of the following papers in the above-entitled action:

1. Order removing said cause from the Superior Court of the State of California to the District Court of the United States.
2. Complaint.
3. Demurrer to complaint.
4. Order overruling demurrer.
5. Answer.
6. Minutes of trial.
7. Verdict of the jury.
8. Judgment.
9. Petition for appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Order allowing appeal.
13. Citation.
14. Supersedeas and cost bond.
15. Order transmitting exhibits.

16. Praecipe for transcript.

BUTLER, VAN DYKE & DESMOND,
J. W. S. BUTLER,
ARTHUR C. HUSTON,
Attorneys for Defendant and Appellant. [130]

Service hereof is hereby admitted and receipt of copy acknowledged this 10th day of January, 1929.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 11, 1929. [131]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 131 pages, numbered from 1 to 131, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Emil Johnson vs. Sacramento Suburban Fruit Lands Company, No. 423—Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Fifty-six and 00/100 ($56.00) Dollars,

and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of January, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [132]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Emil Johnson, Appellee, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Sacramento Suburban Fruit Lands Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated this 25th day of October, A. D. 1928.

BOURQUIN,
United States Judge. [133]

Service of within citation admitted this 25th day of October, 1928.

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[Endorsed]: No. 5692. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Suburban Fruit Lands Company, a Corporation, Appellant, vs. Emil Johnson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed January 16, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.